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RIGHTS AND LIABILITIES
OF
HUSBAND AND WIFE

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Author of "The Appellate Jurisdiction of the House of Lords and Privy Council,"
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—OVID.

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Dedication to the First Edition.

TO

THE RIGHT HONOURABLE

JOHN, LORD CAMPBELL,

&c. &c. &c.

MY LORD,

It is not your eminence as a great lawyer, nor your distinction as a leading member of our highest Legislative Assembly, that moves me to dedicate the following Treatise to your Lordship:—
I inscribe it to the Author of the “Lives of the Chancellors.”

I have the honour to be,

MY LORD,

Your Lordship's very faithful and obliged Servant,

JOHN FRASER MACQUEEN.

28 Aug 07 B. B. co. 625

PREFACE

TO THE FOURTH EDITION.

IN the preparation of the present edition, the Editor has endeavoured to adhere as far as possible to the plan of the original Work; but alterations so many and extensive have been introduced by modern legislation in the law of Husband and Wife, that it has not been found possible to retain unaltered any very considerable portion of the actual text.

The first aim of the Editor has been to make the Fourth Edition, of a Treatise on so important and difficult a subject, of real value to the practising as well as to the theoretical lawyer, and with that object the Index has been enlarged, the Summary of Contents, immediately following the Preface, has been very carefully revised, and the whole work considerably amplified and brought up to date.

Particular attention has been given to the Law of Divorce, in the hope that the disquisition on this subject, when coupled with the Statutes, Rules and Regulations contained in the Appendix, will afford the legal practitioner all requisite information on so important a branch of the law.

With regard to the subject matter of the book—it will be found that during the two decades which have elapsed since the publication of the last edition the nebulous and, at that time, indeterminate effect of the provisions of the Married Women's Property Act, 1882, have to some considerable extent been crystallized and settled by judicial decisions. Consequently at the present day it is noticeable that this Act (as amplified by subsequent Statutes) has not only effected a fundamental change in the *status* or personal capacity of married women, but has also introduced into the circle of domestic life, as a concomitant of the contract between husband and wife, those sound principles of limited liability in pecuniary matters which, in business corporations, have tended so materially to enhance the trade and aggrandize the wealth of the community in the larger sphere of public life.

Marriage at the present day, at least in the eye of the law, must therefore be regarded as—

- (a) "The voluntary union for life of one man with one woman to the exclusion of all others,"* and
- (b) As a collateral agreement for a partnership, in which each of the contracting parties strictly reserves to himself or herself the control over all property not actually dealt with by the settlements made in consideration of the marriage.

* *Hyde v. Hyde and Woodmansee* (1866), L. R. 1 P. & M. 130.

The decisions of the House of Lords in *Morel v. Westmorland* (*Earl of*), and of the Court of Appeal in *Paquin v. Holden*, are luminous examples of the limitations placed by modern legislation upon the respective liabilities of spouses for debts contracted during coverture.

The Summary Jurisdiction (Married Women) Act, 1895, as amplified by sect. 5 of the Licensing Act, 1902, by affording a facile method by which a wife, or a husband (in the case of a habitually drunken wife) may avoid the intolerable burden of domestic infelicity, resulting from cruelty or intemperance, has done much towards ameliorating conjugal unhappiness among the humbler classes of the community.

WYATT PAINE.

4, HARBOUR BUILDINGS,

TEMPLE.

July, 1905.

Author's Preface to the First Edition.

I HAVE endeavoured to make this work useful, clear and short.

The subject is distributed according to the order of time; and the simpler cases are made to introduce those which are more complex.

My plan is to treat first of GENERAL RULES and then of SPECIAL STIPULATIONS.

Questions of Conveyancing I touch upon but lightly, because these are more ably dealt with by writers whose books are necessarily in every hand.

For a similar reason I am silent, or nearly so, as to pleading.

Keeping, however, within the limits of a strict adherence to my subject, the relation of husband and wife is one peculiarly fertile in legal difficulties, and certainly not barren of judicial conflict. Merely to collect the cases would have been easy. But I have not always thought myself at liberty to give decisions without commentary.*

To Mr. Bethell, Q.C., for valuable advice and important suggestions my sincere thanks are due.

The continued revision of Mr. Russell, Q.C., confers an obligation upon my readers, as well as upon myself; and furnishes another proof of the fact that those who have most to do contrive often to have the most leisure.

* The remarks of a legal writer may be of use in practice. He has his mind full of the subject. All the authorities have been reviewed by him. He finds a case which, in the language of the Courts, "stands alone." By a word or two he may prevent it from misleading. He puts readers on their inquiry, and by inducing an exercise of thought fixes legal principles in the reason as well as in the memory.

In the Appendix No. I.,* there is a practical Summary of Proceedings on "Alienations by Married Women," which I hope will prove useful (particularly to solicitors), not only in England, but in Scotland and Ireland, as well as abroad; wherever, in short, married women having English deeds to execute may happen to reside. It is the first effort yet made to methodise and elucidate the system established under the Fines and Recoveries Act, and the rules of the Court of Common Pleas, passed in pursuance thereof. To say nothing of the pains bestowed on it by myself, this Summary has had the benefit of a careful revision by Mr. Millard, of the Acknowledgments Office, who has contributed the forms and other materials now, for the first time, made public. Those who know from experience the many misapprehensions which the new enactments occasion, will be the readiest to commend the good service done by Mr. Millard, to whom I have pleasure in expressing my obligation.

Since the period when Mr. Roper wrote, the law which forms the subject of his prolix though learned Treatise has been greatly matured; and even the Notes of his profound and accomplished Editor have lost much of their value.† Many points of high importance, formerly questioned, are now settled; and doubts have been cleared away by decisions, which give us certainties instead of speculations.

A new work was therefore wanted. How far the present may satisfy the demand of the profession, the profession itself must decide.

J. F. M.

9, OLD SQUARE, LINCOLN'S INN,
March 19th, 1849.

* In consequence of legislative changes, this Summary has been omitted from the present Edition as no longer applicable to existing circumstances.—ED.

† For example, Mr. Jacob's elaborate Commentary of forty-six close pages on the "Solemnization of Matrimony," is entirely superseded by the Judgment of the House of Lords in the Presbyterian Marriages Case, *Queen v. Millis*, 10 Cl. & Fin. 534; *infra*, pp. 3 and 6, n. This, however, with some of his other Notes, must always continue to be curious and interesting, as showing his research, penetration and singular sagacity; but after all, he only doubtfully anticipates that which has been since fixed and concluded by judicial authority. Such of his Notes as retain their utility I have availed myself of, with the proper acknowledgments.

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THE Contract of Marriage, by which man and woman are con-joined in the strictest society of life till death or divorce shall separate them, is the most ancient, the most important, and the most interesting of the domestic relations. Though correctly designated a civil contract, it differs in sundry points from all other civil contracts; and chiefly in this, that it is indissoluble at the will of the parties. For which reason, and because of certain mysterious expressions of high import respecting it in the sacred writings, it has also been deemed a *divine* contract, upon the ground of it having been so constituted by the cir-

Marriage a contract at once civil and divine.

cumstances of its original institution in the case of our first parents, and by the fact of its subsequent elevation into the character of a symbol, or type, emblematical of the union of Christ with his Church. Hence, by Roman Catholics, marriage is considered a sacrament; and even by certain denominations of Protestants it is regarded as in some degree partaking of the sacramental nature, although they do not admit it to be actually a sacrament, the 25th "Article of Religion" of the Church of England stating expressly that matrimony is not to be counted for a sacrament of the Gospel.

It is probably entirely owing to the analogy between things natural and things supernatural so dimly adumbrated forth by the Founder of the Christian religion in the sacred writings of the New Testament, that matrimony as the visible type of a mysterious antitype has been, and still is, considered by certain sects of the Church Catholic to be a holy estate, religious in its chief essential attributes, though temporal and arbitrary in its multiform methods of external celebration.

Anciently
completed
throughout
the Continent
by the mere
consent of
parties.

By the earlier ecclesiastical law, down to the middle of the 16th century, marriage throughout the continent of Europe was looked upon as a *consensual* contract (*a*), capable of being completed by the parties without any interposition of spiritual authority. This appears from the Decretals, from Sanctius *De matrimonii*, and more especially from De Burgh, who (in a Treatise composed at the end of the 14th century) expressly affirms that the priest's co-operation is unnecessary, as not being of the essence of the matrimonial sacrament, but merely recommended by the Church for the sake of greater decency and order. So that according to these venerable testimonies the sacrament of marriage might be mutually administered by the contracting parties to each other, without the aid of the sacerdotal office, or even the presence of any one clothed in holy orders.

(*a*) That is to say, a contract completed by a mere interchange of consent—by the *conjunctio animorum*; so that although the parties, after consent given, should, by death, disagreement, or other cause

whatever, happen not to consummate the marriage *conjunctio corporum*, they were, nevertheless, entitled to all the rights, and subject to all the liabilities of the marriage state.

And here may shortly be mentioned a benevolent fiction of the Roman law, whereby children born bastards were held legitimate on the subsequent marriage of their parents—a rule which was adopted by the Canonists, and followed by every Christian nation, whether Popish or Protestant, England alone excepted. And yet there were not wanting strenuous efforts to import this doctrine hither. But it met with a memorable and final repulse from the Barons, assembled in Parliament at Merton, who, in answer to a proposition for its introduction, emphatically declared *nolumus leges Angliæ mutari* (b).

Thus, then, stood the general law of marriage, when, about three centuries ago, the famous Council of Trent, assembled by the Pope, made a decree, which, after admitting that clandestine marriages had previously been valid, proceeded to declare that, for the future, no marriage should be effectual unless celebrated duly *in facie ecclesiæ* (c). And this continues still to be the ecclesiastical law of Roman Catholic communities (d).

Legitimation
subsequens
matrimonio.

Trent decree
requiring
ecclesiastical
celebration.

(b) It was supposed that although the doctrine of Legitimation *per subsequens Matrimonium* was not received in England, yet if a person, born a bastard in a country where the doctrine obtained, was legitimated by the subsequent marriage of his parents, such person might inherit land in England on the principle that if one be legitimate where he is born, he should be taken to be legitimate all the world over. But in *Birtwhistle v. Vardill* (1839), 7 Cl. & Fin. 895, it was decided by the House of Lords that a Scotchman, under such circumstances, although legitimate for all other purposes, was yet incapable of taking land in England by descent; the rule of the common law, as declared by the Statute of Merton, being that the heir-at-law is, not a man's eldest lawful son, but his eldest son born in lawful wedlock. See Lord Brougham's judgment at p. 955. See also *Re Goodman's*

Trusts (1881), 17 Ch. D. 266. The rule in *Birtwhistle v. Vardill* applies, however, only to the case of descent upon an intestacy, and does not affect the case of a devise of realty to "children," who are entitled to share alike whether legitimated by a subsequent marriage or actually born in wedlock: *Grey's Trusts, In re, Grey v. Stamford*, (1892) 3 Ch. 89. As to the rules governing shares in personalty and determining "kindred" for the purposes of the Statute of Distributions, see *Goodman's Trusts, In re* (1881), 17 Ch. D. 266, C. A.

(c) "The law of the Council of Trent is, that a marriage, to be valid, must be in the presence of the parish priest and two witnesses."—*Evidence of Dr. Wiseman in the Sussex Peerage Case* (1844), 11 Cl. & Fin. 764.

(d) But supposing a marriage of two Protestants, celebrated in a Roman Catholic country, according

Ancient marriage law of England.

Trent decree not received in England ;

where, however, marriages by mere consent were only effectual for certain purposes.

What were anciently the

Upon the celebrated case of the Irish or Presbyterian marriages (*e*), the great question of debate in the House of Lords was, whether the ancient matrimonial law of England was the same as that which had obtained in the rest of Europe anterior to the decree of the Council of Trent. That decree, be it observed, had authority only in those countries which acknowledged the Papal supremacy. It had no reception in England, being dated nearly thirty years subsequent to the breach between Henry VIII. and the Pope. The matrimonial law of England, therefore, continued on its former footing. By that law clandestine marriages were allowed. But they were not attended with the same effects as marriages solemnized *in facie ecclesie*. And herein lies the peculiarity of the old English law, when viewed in contradistinction to the ancient Continental law. By the Continental law, prior to the Council of Trent, a private marriage was as good as a public one. By the law of England, until altered by the statutes to which we are about to advert, a private marriage, that is to say, a marriage not solemnized *in facie ecclesie*, was good only for certain purposes (*f*). Thus, a private or clandestine marriage, or, as it was sometimes called, a verbal contract (which might either be by words of present consent, or by words of promise, followed by cohabitation), was, in the first place, not sufficient to give the woman the right of a widow in respect to dower ; nor, secondly, to give the man the right of a husband in respect of the woman's property ; nor, thirdly, to render the issue begotten legitimate ; nor, fourthly, to impose upon the woman the disabilities of coverture ; nor, fifthly and lastly, to make the marriage of either of the parties (living the other) with a third person void (*g*) ; all these consequences being confined exclusively to marriages solemnized *in facie ecclesie*.

Nevertheless, the effects of clandestine marriages were very

to their own ritual, it would be considered valid, although not in accordance with the *lex loci*.—*Evidence of Dr. Wiseman in the Sussex Peerage Case* (1844), 11 Cla. & Fin. 764.

(*e*) *The Queen v. Millis* (1844), 10

Cla. & Fin. 534 ; *Catherwood v. Catlon* (1844), 13 Mee. & Wel. 261.

(*f*) Bla. Com. Book i. c. 15, p. 439.

(*g*) It did make it voidable. See the next paragraph in the text.

remarkable, though falling greatly short of those which attached upon regular matrimony. For it is now agreed, and has indeed been decided by the House of Lords, that at common law, a contract entered into between man and woman by words of present consent was indissoluble. The parties could not release each other from the obligation. Either party, too, might by a suit in the spiritual court compel the other to solemnize the marriage *in facie ecclesie*. It was so much a marriage, that if they cohabited together before solemnization, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract, moreover, was considered to be of the very essence of matrimony, and was, therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium* and sometimes *ipsum matrimonium*. Another, and a most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnizing such marriage *in facie ecclesie*, the same might be set aside even after cohabitation and after the birth of children (*h*): and the parties might be compelled to solemnize the first marriage *in facie ecclesie*.

effects of private marriages in England.

So a contract of marriage *per verba de futuro*, followed by cohabitation, produced precisely the same consequences as a contract *per verba de præsenti*. For where a copula ensued upon the promise, the present consent essential to matrimony was supposed to be at that moment exchanged between the parties; a legal presumption which, though but slightly founded in nature or reality, was held to be abundantly recommended by its equity and the just check which it imposed upon perfidy.

The ancient law of England, therefore, with respect to the constitution of marriage, was very peculiar, and no more to be understood by reference to the Continental system, or even to the practice of the sister country of Scotland, than the law of real property or any other branch of our jurisprudence. And this, it is submitted, was the great point established in the case

Ancient law of England as to the constitution of marriage very peculiar.

(*h*) It was not however absolutely void. A proceeding to set it aside was necessary.

of the Irish marriages above referred to; which, though carried in the House of Lords with infinite difficulty, and in spite of many strong and, as some may think, insuperable arguments opposed to it, must henceforth be regarded as settled and concluded in all legal reasoning on the subject; the short general proposition derivable from the adjudication being, that by the ancient law of England a marriage by private contract was good only for certain purposes, and those not the most important ones; no marriage being absolutely perfect until celebrated *in facie ecclesie* by the intervention of a person in holy orders (i); that is to say, orders conferred by episcopal authority (k).

Priest always
indispensable
to perfect
marriages.

Evils of
clandestine
marriages.

Towards the middle of the 18th century, the "evil of clandestine marriages" was felt to be "one of the growing evils of the times, productive of many calamities in families, and of great mischief and disorder in the community" (l). Hence, in the year 1753, a statute (m) was passed at the instigation of Lord Chancellor

(i) In India, where the common law of England as to marriage has been introduced, the presence of a minister is not essential. See *Maclean v. Cristall* (1849), Perry's Oriental Cases, 75.

(k) The theory of Sir Wm. Scott's celebrated judgment in *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. Rep. 54, does not, it must be owned, correspond throughout with the views above suggested. But it is to be remembered that the Irish Marriage case (*Queen v. Millis* (1844), 10 Cl. & Fin. 534) underwent the most extensive and elaborate examination; and the decision is by the last resort assisted by the learned judges; so that it is vain and idle to talk of a comparison of opinions. See also *Catherwood v. Caslon* (1844), 13 Mee. & Wel. 261, decided by the Court of Exchequer, following the House of Lords. Sir Wm. Scott, too, will be found, on a reperusal, to betray symptoms of hesitation and uncertainty when

dealing with the ancient common law of marriage in this country.

(l) Per Lord Hardwicke, *Middleton v. Croft* (1736), 2 Atk. 650.

(m) 26 Geo. 2, c. 33. It is said, that at the time when this Act was introduced, the attention of the legislature had been particularly drawn to the subject, by a case which came before the House of Lords in its judicial capacity. The case seems to have been that of *Campbell v. Cochrane*, an appeal from Scotland, noticed in the opinions given in *Dalrymple v. Dalrymple* (1811), 2 Hagg. 129. That case was decided by the House of Lords on the 31st of January, 1753, and on the same day it was ordered that the judges should prepare a bill for the better preventing clandestine marriages.—*Lords' Journals*, vol. 28, p. 14. But, although the example which this case furnished of the effects of the Scotch law of marriage was probably the immediate occasion of the measure, it

Hardwicke, intituled "An Act for the better preventing of Clandestine Marriages"; which Act is considered by Blackstone to be "an innovation upon our ancient laws and constitution" (n), a sentence which there is but little doubt it deserves. For, adverting to "the great mischiefs and inconveniences" which have arisen from verbal contracts, the statute enacted that "in no case whatever should any suit or proceeding be had in any ecclesiastical court, to compel a celebration of any marriage *in facie ecclesie* by reason of any contract of matrimony whatsoever, whether *per verba de presenti* or *per verba de futuro*." From this date, therefore, verbal contracts were no longer, as before, indissoluble. Solemnization could not be enforced, and a subsequent marriage solemnized *in facie ecclesie* could not be avoided, but, on the contrary, would be valid and binding from the time of its celebration, and would be accompanied by all the civil consequences of a regular and perfect marriage.

Remedy thereof by Lord Hardwicke's Marriage Act, 26 Geo. 2, c. 33.

The statute rendered it indispensable that all marriages should be celebrated in some parish church or public chapel. Liberty, however, was given to evade this obligation, by obtaining a special licence from the Archbishop of Canterbury; a dispensation too expensive to be frequently resorted to. The marriage must also have been preceded by publication of banns; but these might be got rid of by licence from the spiritual Judge. The statute further enacted that all marriages should be solemnized in the presence of two or more witnesses, besides the officiating minister; and an entry of the proceeding was to be made in a register appointed for the purpose, to be signed by

Requisites under Lord Hardwicke's Act.

was confined to England. Some alteration in the law of Scotland was however contemplated at the time. After the bill had been committed, it was ordered that the Lords of Session in Scotland should prepare a bill for the more effectually preventing clandestine marriages in that part of the kingdom.—*Lords' Journals*, vol. 28, p. 98. By 19 & 20 Vict. c. 96 (for amending the law of marriage in Scotland), "no irregu-

lar marriage contracted in Scotland by declaration, acknowledgment or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage, any law, custom or usage to the contrary notwithstanding."

(n) 1 Com. c. 15, p. 438.

the parties, the minister, and the witnesses. Many other formalities were prescribed by the Act; which, moreover, provided that, where either of the parties (not being a widow or widower) was under twenty-one, all marriages celebrated by licence without consent of guardians should be absolutely void (o).

Its operation in England similar to that of the Trent decree on the Continent.

The effect of Lord Hardwicke's statute was to do away entirely with clandestine marriages in England; and, so far, its operation here was very much the same as that of the Trent decree upon the Continent.

But it often worked injustice. Hence the 4 Geo. 4, c. 76.

The provisions of this enactment (in many instances productive of great hardship and injustice) continued to be law till the year 1823, when, by the 4 Geo. 4, c. 76, the penalty

(o) "Lord Hardwicke's Marriage Act, with considerable modifications and improvements, remains in force, and regulates in England the most important of all contracts upon which civil society itself depends."—*Lord Campbell's Lives of the Chancellors*, vol. 5, p. 124. The noble biographer states, that before the Act, "young heirs and heiresses, scarcely grown out of infancy, had been inveigled into mercenary and disgraceful matches; and persons living together as husband and wife for many years, and become the parents of a numerous offspring, were pronounced to be in a state of concubinage; their children being bastardized because the father had formerly entangled himself in some promise which amounted to a pre-contract, and rendered his subsequent marriage a nullity. In the public prisons, particularly in the Fleet, there were degraded and profligate parsons ready, for a small fee, to marry all persons at all hours there; and to go, when sent for, to perform the ceremony in taverns or in brothels." After remarking that "the Act declared

null all marriages that were not celebrated by a priest in orders," and that "in the case of minors the licence should be void, without the consent of parents or guardians," his lordship proceeds to point out as its prominent defects that "it required Roman Catholics, Dissenters, and others, to submit to it, or be debarred from matrimony altogether. Another great defect was, that no provision was made by it respecting the marriage out of England of persons domiciled in England, so as to prevent the easy evasion of it by a trip to Gretna Green. The measure was likewise highly objectionable in making no provision for the marriage of illegitimate children, who had no parents recognized by law, and could only have guardians by an application to the Court of Chancery; and in declaring marriages, which were irregular by reason of unintentional mistakes in banns or licences, absolutely void, although the parties might have lived long together as man and wife, with a numerous issue considered legitimate, until the discovery of the irregularity."

of nullity was confined to the case of persons *wilfully consenting* (*p*) to the performance of marriage, before publication of banns, or before obtaining a licence, or by one not in holy orders, or elsewhere than in a church or licensed chapel. The want of consent, too, by guardians, in the case of minors, did not, by this Act of Geo. IV., invalidate the marriage; but the minister officiating in such a case was made liable to banishment (*q*). And the 23rd section, to be more particularly adverted to hereafter (*r*), provided that, in the event of any fraud practised to procure the contract, the party guilty thereof should forfeit all property accruing from the marriage (*s*).

The statute of Geo. IV. was certainly an improvement upon that of Geo. II., but it was far from meeting with universal approbation; for, besides many other objections, it left the power of marrying as it stood before, exclusively in the hands of the Church; a restriction which gave offence to almost every denomination of Dissenters. The consequence was, that in the year 1836, the marriage law of this country underwent a still further change by the passing of the 6 & 7 Will. 4, c. 85, commonly called Lord John Russell's Act; which was further supplemented by the Acts subsequently passed for its amendment (7 Will. 4, c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119; and 23 & 24 Vict. c. 18). These statutes, combined with the Marriage Confirmation Act, 1860 (*t*), the Marriages Validity Act, 1886 (*u*), the Marriage Act, 1886 (*x*), the Foreign Marriage

Present law,
the 6 & 7
Will. 4, c. 85,
and the
amending
and subsequent
Acts.

(*p*) The marriage will not be held to be null and void unless both parties "knowingly and wilfully" concurred in the undue publication of the banns: *Gompertz v. Kensit* (1872), L. R., 13 Eq. 369; *Templeton v. Tyree* (1872), L. R., 2 P. & M. 420; or were aware at the time of the ceremony of the absence of banns and licence: *Greaves v. Greaves* (1872), L. R., 2 P. & M. 423.

(*q*) As to when consent under this Act might be dispensed with, see *Yonge v. Furze* (1857), 3 Jur., N. S. 603.

(*r*) See *post*, p. 15.

(*s*) But see 3 Geo. 4, c. 75, and 4 Geo. 4, c. 17, and Parliamentary Debates of 1822 and 1823. In the above sketch the complicated provisions of these Acts are not set out, because they were soon afterwards superseded, or nearly superseded, by the 4 Geo. 4, c. 76. See 2 Roper on Husband and Wife, 482; and see, also, *The King v. Inhabitants of Birmingham* (1828), 8 Barn. & Cress. 29, 35, and 5 Bac. Abr. 288.

(*t*) 23 & 24 Vict. c. 24.

(*u*) 49 & 50 Vict. c. 3.

(*x*) 49 & 50 Vict. c. 14.

Act, 1892 (*y*), the Marriage Act, 1898 (*z*), and the Marriage Validity Act, 1899 (*a*), have not only placed the marriage law of England on its present footing, but also, by enabling parties, desirous of entering into wedlock without any appeal to an established ecclesiastical authority, either to complete their contract in a purely secular manner, or else in accordance with the views of the particular religious sect to which they belong, have done much to ameliorate the inevitable friction resulting from that spirit of favouritism which had in earlier times accorded special privileges to one particular denomination. Such persons, therefore, as object to marry *in facie ecclesie* may now repair to the registrar; and, upon giving the notices (*b*) and procuring the certificates as prescribed by the statutes, may be married, either before that officer by a verbal declaration, or in any registered building appointed for the purpose, and may solemnize their marriage according to any form or ceremony they please (*c*) without the presence of the registrar (*d*); taking care, however, whichever mode they resort to, that two witnesses be present, and that the proceeding be completed with open doors between eight in the forenoon and three in the afternoon (*e*); so as to afford, apparently, some security for order and publicity (*f*).

(*y*) 55 & 56 Vict. c. 23.

(*z*) 61 & 62 Vict. c. 58.

(*a*) 62 & 63 Vict. c. 27. See also the Marriages Legalization Act, 1901 (1 Ed. 7, c. 23), and the Marriages Legalization Act, 1903 (3 Ed. 7, c. 26).

(*b*) The "due notice" required by these Acts is a notice conforming to the formalities provided by 6 & 7 Will. 4, c. 85; *Holmes v. Simmons* (1868), L. R., 1 P. & M. 523. There is no analogy between a marriage by banns and a marriage by notice before the registrar. *Ibid.*

(*c*) As to marriages according to the usages of the Quakers or Jews, see 19 & 20 Vict. c. 119, s. 21; 23 & 24 Vict. c. 18; 35 & 36 Vict. c. 10; and 61 & 62 Vict. c. 58, s. 13.

(*d*) 61 & 62 Vict. c. 58, s. 4.

(*e*) The Marriage Act, 1886 (49 & 50 Vict. c. 14). This Act, which applies to England only, extends the hours for the solemnization of marriage, which were formerly from 8 a.m. to 12 a.m., these being the hours prescribed by the 62nd canon, and hence commonly called the canonical hours. See 4 Geo. 4, c. 76, s. 21.

(*f*) A Bill introduced into Parliament on June 27th, 1905, provides (if passed) by sect. 1, that "A Secretary of State may, in the case of marriages solemnized in England which appear to him to be invalid or of doubtful validity by reason of some informality, make provisional order for the purpose of removing the invalidity or doubt."

Marriages thus completed are in all respects as binding and as effectual as if they were celebrated sacerdotally.

In order, however, to render the marriage of domiciled foreign subjects in England valid by English law, it is apparently necessary that such marriage should either conform with the requirements of the English marriage laws, or else that the ceremony should be performed at the embassy of the particular nationality to which the contracting parties belong; the decision of the Divorce Division of the High Court in the case of *Bailet v. Bailet* (g), affirming the validity of such a marriage if performed at a foreign consulate in London, being, it is submitted, open to very considerable question. A perfectly valid marriage at a British consulate in a foreign country may, however, be contracted by British subjects, or by a British subject with a foreigner, under the provisions of the Foreign Marriage Act, 1892 (h).

Marriages at Embassies and Consulates.

The law which regulates the constitution of the Marriage Contract being now stated, let us see who are capable of entering into this relation (i). And first, we may observe that no persons are competent to bind themselves in matrimony until they have attained the age of consent, which, by the common law (following the Roman), is fixed at fourteen in males and twelve in females; not, as some writers affirm, because the parties are then supposed to have sufficient discretion to appreciate the consequences of so critical and responsible an engagement; but because in general they have by that time arrived at physical maturity, and the worst social evils would ensue from holding them incapable of marrying. Not only must the parties be of the proper age, but in the case of minors they must secure the requisite consents, recent legislation having in that respect made no change (k). They must have competent mental under-

Who may marry. The parties must have attained the age of 14 in the male and 12 in the female, and there must be the requisite consents.

Other requisites.

(g) (1901), 81 L. T. 272.

(h) And see *Hay v. Northcote*, (1900) 2 Ch. 262.

(i) A man "*civiliter mortuus*" is not incapable of marriage according to the law of England. *Kynnaird v. Leslie* (1866), 35 L. J., C. P. 226, 233.

(k) 6 & 7 Will. 4, c. 85, s. 10. See also Form of Licence, Schedule C. After due publication of banns no evidence of the consent of the guardians is necessary. As to the formalities to be observed and the persons whose consent is a condition precedent to the grant of a

Distinction between banns and licences.

standing, and competent corporal capacity. So likewise, we may remark, neither of the parties can enter into the contract if married at the time to another individual; in which case, besides the penalties of bigamy (*l*), it is evident that, if the first marriage be legally good, the second must, of necessity, be legally bad. And here, it may be added that, by Lord Lyndhurst's Act (*m*), marriages between persons within the prohibited degrees of consanguinity and affinity are now *ipso facto* void, and not merely voidable (*n*).

It may be convenient here to mention that an English Court will, under certain circumstances, draw inferences presuming the existence of a valid contract of marriage (even when there is no direct evidence of its solemnization) from the statements of the parties living together as man and wife, when combined with long continued cohabitation (*o*). It must, however, in all cases be understood that the validity, in England, of a marriage contracted abroad, or of a form of marriage solemnized in this country, even in a duly registered place, depends primarily upon the fact that such marriage in no respect violates the fundamental principles of morality prevalent throughout Christendom (*p*).

marriage licence, see the Marriage Act, 1823 (4 Geo. 4, c. 76), ss. 14—17.

(*l*) 24 & 25 Vict. c. 100, s. 57.

(*m*) 5 & 6 Will. 4, c. 54.

(*n*) As to the illegality of marriage with a deceased wife's sister, see *Brook v. Brook* (1858), 27 L. J., Ch. 401; *Fenton v. Livingstone* (1859), 7 W. R. (H. L.) 671; *Reg.*

v. Chadwick (1847), 17 L. J., M. C. 33.

(*o*) *Shepherd, In re, George v. Thyer*, (1904) 1 Ch. 456.

(*p*) *Bethell, In re* (1887), 38 Ch. D. 220; *Hyde v. Hyde and Woodmansee* (1866), L. R., 1 P. & D. 130; *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76.

OF FORFEITURES UNDER 4 GEO. 4, c. 76, AND
6 & 7 WILL. 4, c. 85.

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As preliminary to the investigation upon which we are about to enter, it is proper to intimate here, that the validity or invalidity of the Marriage Contract will not be further discussed in the following pages; the objects of which are mainly directed to a practical inquiry into the effects of the contract and its incidents assuming such contract to be valid. But in certain cases those effects are prevented from arising; and it is proper to state such cases at the outset.

This work limited to the effects of the marriage contract.

In certain cases those effects do not arise.

We have seen that the marriage of persons under age may have unquestionable validity, although entered into without the consent of guardians (q). Such marriages, however, though not void, are nevertheless forbidden by the law; and it sometimes happens that parties eager to effect matrimony commit a fraud in order to get rid of the effects of this legal interdiction.

What, then, are the consents required? The 16th section of the 4 Geo. 4, c. 76, enacts:—

Provisions of the 4 Geo. 4, c. 76, s. 16.

That the father of any person under twenty-one (not being a widower or widow); or if the father shall be dead, the guardian or guardians of the person of the party so under age, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such

Consent of guardians required to marriages of infants.

person so under age, *unless there shall be no person authorized to give such consent.*

Where guardians are *non compos*, &c.

By the 17th section it is enacted :—

That in case the father or fathers of the parties to be married, or of one of them, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary to the marriage, shall be *non compos mentis*, or beyond the seas, or shall unreasonably or from undue motive withhold consent, an application may be made to the Court of Chancery by petition in a summary way ; and if the proposed marriage shall appear proper, a judicial declaration to that effect may be made, which shall be as effectual as if a consent had been duly had from guardians.

It has been decided that this clause does not apply to the case of a father who is beyond the seas, or unreasonably withholds his consent, but only to a case in which he is *non compos mentis* (r). In *Cook v. Fryer* (s), on the proposed marriage of an infant daughter of one who was *non compos mentis*, a petition was presented to the Lord Chancellor, under this section, for his consent, in order to obtain a licence. The petition was referred to the Master, and the intended husband by affidavit stated that he had agreed to make a certain settlement. The Master reported in favour of the marriage ; and the report was confirmed. The parties did not avail themselves of the consent of the Lord Chancellor, but shortly afterwards married under the 6 & 7 Will. 4, c. 85, without licence. The settlement mentioned in the affidavit was not made, the parties having entered into articles for a different settlement. It was held by Vice-Chancellor Wigram, that the proposal laid before the Master amounted to a contract which, in the absence of any settlement properly substituted for it, the Court would enforce.

The first inquiry, therefore, in every case must be whether the parties when they intermarried were of lawful age, and, if not of lawful age, whether the requisite consents were obtained ; because, although the want of such consent will not invalidate the marriage, it will produce a consequence which some may

(r) *Exp. I. C.* (1838), 3 Myl. & Cr. 471.

(s) (1842), 1 Hare, 498.

think a greater calamity ; for by the 23rd section of the 4 Geo. 4, c. 76, it is enacted :—

That, if any marriage by licence shall be procured by a party to such marriage to be solemnized between persons one or both of whom shall be under age (not being a widower or widow), by means of such party falsely swearing ; or if any marriage by banns shall be procured by a party thereto to be solemnized between persons one or both of whom shall be under age (not being a widow or widower), such party knowing that such person under age had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of this Act, and having knowingly caused or procured the undue publication of banns (t), then, and in every such case, it shall be lawful for his Majesty's Attorney-General, by information in the nature of an English bill in the Court of Chancery (u), at the relation of a parent or guardian of the minor, to sue for a forfeiture of all property which hath accrued or shall accrue to the party so offending by force of such marriage ; and such Court shall have power to declare such forfeiture, and thereupon to direct that such property shall be secured for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the Court shall think fit. And if both the parties so contracting marriage shall in the judgment of the Court be guilty of such offence, it shall be lawful for the Court to settle and secure such property immediately, for the benefit of the issue of the marriage, subject to such provisions for the offending parties as the Court shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other (x).

Forfeitures by reason of fraudulent marriages without consent of guardians.

The clause, of which only an abridgment is here given, requires that, before any information is filed in pursuance of it, the case be made out to the satisfaction of the Attorney or Solicitor-General, upon oath (y). It has been decided (z), that

(t) See *Gompertz v. Kensit* (1872), L. R., 13 Eq. 369; *Templeton v. Tyree* (1872), L. R., 2 P. & M. 420; *Greaves v. Greaves* (1872), *ibid.* 423.

(u) Now, by an action in the High Court of Justice ; Rules of Supreme Court, 1883, Ord. I. r. 1.

(x) As to the extension of these provisions to the marriages of Quakers and Jews, see 6 & 7 Will. 4, c. 85, s. 2, and 19 & 20 Vict. c. 119,

s. 19 ; to marriages celebrated abroad, 55 & 56 Vict. c. 23 ; and to marriages before the registrar, 19 & 20 Vict. c. 119, s. 19.

(y) By the 24th section of the same Act, "all agreements, settlements and deeds, entered into or executed upon marriages, in relation to which such informations as aforesaid shall be filed," are made void.

(z) *Attorney-General v. Mullay* (1828), 4 Russ. 329.

where a husband incurs a forfeiture under this clause, the Court has no discretion to mitigate the penalty ; but is bound to settle and secure all property, present and future, of the wife, for the benefit of herself and the issue of the marriage.

Form of
settlement.

The provisions of this section are satisfied by a settlement for the benefit of the wife and the issue of the marriage in such terms as to exclude the husband from all estate or interest which he might otherwise have acquired by force of the marriage ; but there is no necessity to exclude him from the general power of appointment conferred on the wife in the event of there being no children of the marriage (a).

The proper form of settlement, as determined in *Attorney-General v. Lucas*, is, that the whole of the wife's property should be vested in trustees upon trust for her during her life for her separate use without power of anticipation ; and that "if there be no children the wife should have a power of appointing the whole during the coverture by will, and, if she survive her husband, either by deed or will : if there be children, and the wife dies first, then the whole to go to the children, if sons at twenty-one, and, if daughters, at twenty-one or marriage ; but if she survive her husband, then two-thirds to the children of the marriage, and one-third to be subject to her appointment by deed or will."

Settlement by
order of
Court.

In order to avoid the expense of a settlement, the fund will in proper cases be settled by the order of the Court (b).

The Attorney-General should be represented separately from the relators (c). Where the husband *alone* incurs a forfeiture,

(a) *Attorney-General v. Lucas* (1848), 2 Ph. 753 ; see also *Attorney-General v. Clements* (1871), L. R., 12 Eq. 32 ; and *Attorney-General v. Read* (1871), L. R., 12 Eq. 38, where Bacon, V.-C., reluctantly followed the decision in *Attorney-General v. Lucas* (1848). It will be observed that according to the minutes in *Attorney-General v. Clements* (1871), L. R., 12 Eq. 37, the husband was excluded from the general power

of appointment ; but the actual judgment contained no such exclusion. See the Form of Order declaring the trusts in case of forfeiture in Seton, 5th ed. pp. 904-5.

(b) *Attorney-General v. Clements* (1871), L. R., 12 Eq. 32 ; *Attorney-General v. Akers*, Seton, 5th ed. pp. 905-6.

(c) *Attorney-General v. Read* (1871), L. R., 12 Eq. 38.

the Court has no authority to order any settlement of the wife's property on her issue by any subsequent marriage (d).

(d) *Attorney-General v. Mulla* (1844), 7 Beav. 351. In order to sustain an information, a false affidavit that a party is of full age is equivalent to a false affidavit that the necessary consent to a minor's marriage has been obtained. And it is not necessary to show that the minor was entitled at the time of the marriage to any property, either in possession, reversion, remainder or expectancy. *Attorney-General v. Severne* (1844), 1 Coll. 313. A husband charged with procuring his marriage with a minor by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts on an information. *Attorney-General v. Lucas* (1843), 2 Hare, 566.

Part First.

Showing the Operation of General Rules unaffected by
Special Contract.

CHAPTER I.

RIGHTS ARISING FROM THE MARRIAGE.

SECTION I.

CHATTELS PERSONAL IN POSSESSION.

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Respective
interests of
husband and
wife.

IN treating of the rights of parties arising from the fact of marriage, it may be observed at the outset that the wife did not under the old law, and does not under the present law, during the lifetime of her husband, take any estate or interest in his property; while, on the other hand, the husband acquired under the old law rights and interests, absolute or qualified, in the property of the wife, which it is now proposed to explain, in the first place, as they existed under the common law, and secondly, as they have been modified and ultimately abolished by recent legislation. The rights and interests of a surviving husband or wife in the property of the deceased spouse will form the subject of separate consideration.

In order to understand the doctrine of the common law upon this subject, it is necessary to bear in mind that, according to a legal fiction of the ancient jurists, the husband and wife became one person in law, or rather the personality of the wife was merged in that of the husband. This principle was carried out to its logical result, so far as rights of property were concerned; but it was qualified, if not abandoned, when it was necessary to consider the *acts* of the wife. As to these, the wife was regarded as distinct from her husband, but so entirely under his power and control that she could do nothing of herself, but everything by his licence and authority.

Chap. I. s. 1.
Old principle.

The order in which it will be most convenient to consider this subject will be—(1) Chattels personal; (2) Chattels real; and (3) Real estate; the questions arising on Choses in action being reserved for consideration in a subsequent chapter.

Under both the old and the present law, chattels personal, which before the marriage belonged to the husband, continue to belong to him exclusively after the marriage. Chattels personal in possession, on the other hand, belonging to the wife in her own right of whatever kind or denomination, which she was beneficially possessed of at the date of the contract, or which came to her during the coverture, and specific chattels or goods in the hands of a third person, were under the old law absolutely bestowed upon the husband by virtue of the marriage (*a*); so that he could dispose of them in any way he pleased, whether he survived her or not. The right of property in them was, by the marriage, established in the husband exclusively, so that, even if he died in the lifetime of his wife without recovering the specific chattels or goods, they would belong to his representatives, and not to the wife by right of survivorship.

Chattels personal of husband.

Chattels personal of wife under the old law.

The phrase “chattels personal in possession,” as here used, includes all moveables of the wife, such as jewels, household goods and the like, and cash in her hands, but not money at her

(*a*) “Marriage is an absolute gift of all chattels personal in possession in the wife’s own right, whether the husband survive the wife or no.” Co. Litt. 300.

Chap. I. s. 1. bankers, which, unless deposited in a sealed bag, is probably a chose in action (*b*).

Bills of exchange.

Bills of exchange and promissory notes payable to the wife had this resemblance to chattels personal in possession, that instantly upon the marriage the husband alone could negotiate and pass them by indorsement, the wife being rendered incapable of so doing by the disabilities of coverture (*c*).

General position of wife in respect of personal property.

The general position of a wife with respect to her personal property was summed up in an early edition of Chitty on Contracts thus (*d*) :—

A married woman cannot acquire any legal right to personal property during her coverture; and if she have any money or goods in her possession, and she lend the one or sell the other, the right to recover the debt or the value of the property thus parted with vests in the husband.

Statutory modifications.

Such, according to the common law, were the rights and interests acquired by the husband in respect of his wife's personal property, whether it belonged to her at the date of the marriage or was subsequently acquired during the coverture. It is now necessary to state the modifications of these rights and interests which have been introduced by modern legislation.

Act of 1870.

By the Married Women's Property Act, 1870 (*e*), which came into operation on the 9th August, 1870, but has since been repealed, with a saving clause as to property acquired before the repealing Act came into operation (*f*), the following descrip-

(*b*) *Carr v. Carr* (1811), 1 Mer. 541, n.; *Hill v. Foley* (1844), 1 Phill. 399; 2 H. L. Cas. 28. In this case it was decided by the House of Lords that the relation between banker and customer was only the ordinary relation between debtor and creditor, and that, therefore, cash at a banker's was merely money lent. *Garnett v. M'Kewan* (1872), L. R., 8 Ex. 10. As to "the wife's choses in action," see *post*, p. 33.

(*c*) *Barlow v. Bishop*, 1 East, 432. The husband also acquired by the marriage a right to reduce into pos-

session the wife's choses in action. But the wife's property in these was not divested by the marriage. For, on the contrary, it remained in her during the coverture, and survived to her after her husband's death, unless he, in his lifetime, had reduced them into possession. The rights of the husband and the wife in the wife's choses in action are treated of subsequently. See *post*, Chap. I., s. 5.

(*d*) P. 157, 7th ed.

(*e*) 33 & 34 Vict. c. 93.

(*f*) 45 & 46 Vict. c. 75, s. 22.

tions of property, to which formerly the husband became entitled Chap. I. s. 1. by virtue of the marriage, were declared to belong to the wife for her separate use:—

(1) The wages and earnings of any married woman acquired or gained by her after the passing of the Act in any employment, occupation or trade in which she was engaged, or which she carried on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill, and all investments of such wages, earnings, money or property (*g*).

(2) Any deposit in a savings bank, and any annuity granted by the Commissioners for the Reduction of the National Debt in the name of a married woman, or in the name of a woman who might marry after such deposit or grant (*h*).

(3) Any sum forming part of the public stocks and funds, and not being less than 20*l.*, entered in the bank books in the name of any woman as a married woman entitled to her separate use (*i*).

(4) Shares or stock of any joint stock company to the holding of which no liability was attached, registered in the books of the company in the name of any woman as a married woman entitled to her separate use (*k*).

(5) The share, benefit, debenture, right or claim in, to, or upon the funds of any industrial and provident society, friendly society, benefit building society, or loan society, to the holding of which no liability was attached, and which was entered in

(*g*) Sect. 1. As to what is separate trading on the part of the wife, see *Ashworth v. Outram* (1877), 5 Ch. D. 923; *Lovell v. Newton* (1878), 4 C. P. D. 7; *Loe v. Lardner* (1856), 4 W. R. 597; *Laporte v. Coastick* (1874), 23 W. R. 131; *Warne v. Routledge* (1874), L. R. 18 Eq. 497; *Whittaker, In re* (1882), 21 Ch. D. 657; *Dearmer, In re* (1886), 53 L. T. 905; *Smith v. Hancock*, (1894) 2 Ch. 377; *Gaynor*

v. Gaynor, (1901) 1 Ir. R. 217. See also Chitty on Contracts, 14th ed. p. 195.

(*h*) Sect. 2.

(*i*) Sect. 3. Extended to Consolidated Stock of the Metropolitan Board of Works by 34 & 35 Vict. c. 47, s. 14. This stock is transferred by 51 & 52 Vict. c. 41, s. 40 (sub-s. 8), to the London County Council.

(*k*) Sect. 4.

Chap. I. s. 1. the books of the society in the name of any woman as a married woman entitled to her separate use (*l*).

(6) All personal property to which any woman married after the passing of the Act became entitled as next of kin, or one of the next of kin, of an intestate (*m*).

(7) Any sum of money not exceeding 200*l*. to which any woman married after the passing of the Act became entitled under any deed or will (*n*).

(8) The rents and profits of any freehold, copyhold or customaryhold property which descended upon any woman married after the passing of the Act as heiress or co-heiress of an intestate (*o*).

Act of 1882,
as amplified
by Act of
1893.

By the Married Women's Property Act, 1882 (*p*), which came into operation on the 1st January, 1883, the doctrines of the common law affecting the property of women on marriage have been almost entirely abrogated. In the case of marriages contracted after the commencement of the Act, they are completely swept away; and in the case of marriages contracted before that date, they are destroyed as to property the title to which accrues after the commencement of the Act.

With the exception, therefore, of property acquired before the 1st January, 1883, the right of the husband to the property of the wife during the coverture has been abolished, and the fact of marriage no longer effects any alteration in a woman's right to, or power over, her property.

(*l*) Sect. 5.

(*m*) Sect. 7.

(*n*) *Ibid*.

(*o*) 33 & 34 Vict. c. 93, s. 8.

(*p*) 45 & 46 Vict. c. 75; and see
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SECTION II.

CHATELS REAL.

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Under both the old and the present law chattels real, which before the marriage belonged to the husband, continue to belong to him exclusively after the marriage (q).

Under the old law chattels real, which before the marriage Old law. belonged to the wife, fell, by virtue of the marriage, so much under the dominion of the husband that, except in one particular, they were entirely at his disposal. He could mortgage or alienate and dispose of them at pleasure, so that the transaction took effect in his lifetime, that is to say, by act *inter vivos*. But during the marriage there was this qualification of his right (and it was the only restraint on his otherwise unrestricted dominion), namely: that he could not by will bequeath his wife's chattels real to the exclusion of her claim by survivorship; for, if she outlived him, she was entitled to them unless

(q) *Hill v. Edmunds* (1852), 5 De G. & Sm. 603.

Chap. I. s. 2. the property had been changed by an act completed in his lifetime (*r*).

But if he was the survivor he had them absolutely.

On the other hand, if the husband were the survivor, his wife's chattels real became *his* absolutely; to be disposed of by him, either by deed or will (*s*). For he was considered to have had during the marriage possession of them by a kind of joint tenancy with his wife; so that, upon her pre-deceasing him, he had them by force of his marital right, and not as her representative. It follows, therefore, that in order to secure his wife's chattels real, the husband surviving her was not obliged to take out administration to her (*t*). The alienation by the husband of his wife's chattels real, if completed in his lifetime, might be with or without consideration (*u*).

His agreement bound her surviving.

And since that which for a valuable consideration is agreed to be done is considered in equity as actually performed, it would appear that if the husband had agreed to dispose of his wife's chattel real, as, for example, of her legal term for years, such agreement or covenant would be enforced against the surviving wife (*x*).

Her legal term and her trust term.

If he assigned the wife's legal term, the wife was clearly bound. And if he assigned her trust term, she was also bound; upon the principle that equity, to preserve uniformity in titles to estates, follows the law. But in the case of a trust term, the wife might claim her equity to a settlement (*y*).

(*r*) A covenant by a husband in a lease of his wife's chattels real, to renew upon the expiration of the existing term, has been held sufficient in equity to bind the wife's right after her husband's decease. *Steel v. Cragh* (1723), 9 Mod. R. 43.

(*s*) As to chattels real which could not possibly vest in the wife during coverture, see *Duberley v. Day* (1852), 16 Beav. 33.

(*t*) 1 Roll. Abr. 345; 2 Black. Com. 433. And where the wife was entitled to an equitable reversionary interest in long leaseholds, and died before she became entitled

in possession, it was held that it was not necessary for the husband to take out letters of administration to his deceased wife in order to complete his title to them. *Re Bellamy* (1883), 25 Ch. D. 620.

(*u*) *Mitford v. Mitford* (1803), 9 Ves. 87.

(*x*) *Bates v. Dandy* (1741), 2 Atk. 207; *Steel v. Cragh* (1723), 9 Mod. 43. See also *Clarke v. Burgh* (1845), 2 Coll. 221, and *Druce v. Denison* (1801), 6 Ves. 385.

(*y*) See equity to settlement, *post*. *Sturgis v. Champneys* (1839), 5 My. & Cr. 97.

If a woman sued out an *elegit*, and then married, her husband was at liberty to assign this interest of his wife as he might think proper; and so also with respect to statutes merchant and statutes staple (z). Chap. I. s. 2.
Elegits, &c.

The power which the law gave the husband to alienate the whole interest of the wife in her chattels real, necessarily authorized him to dispose of *part* of it. If, therefore, the husband, being possessed of a term for forty years in right of his wife, or jointly with her, demised it for *twenty* years reserving rent, and died, such demise, or underlease, would be good against her, although she survived him; but the residue of the original term belonged to her, as undisposed of by her husband (a). When only
part alienated
the residue
survived.

The husband might defeat his wife's survivorship by other acts besides express alienation; thus, if at the time of her marriage she were a lessee for years, and her husband took a lease of the land for both their lives, this would amount to a disposition of the term; because, by the acceptance of the second lease, the term would be considered as surrendered by operation of law (b). Acts of dispo-
sition besides
express alien-
ation.

The husband's power extended also over his wife's reversionary interests in chattels real, even over those that were dependent on contingencies not determining in his lifetime (c).

If the husband mortgaged the wife's chattels real, and if, by payment of the money on *the day*, the estate of the mortgagee ceased, it would seem that the wife's right by survivorship was not affected (d). Mortgage by
the husband
of wife's
chattels real.

Such a mortgage might operate on the legal interest but leave Effect of such
mortgage on

(z) 1 *Rop.* 181.

(a) *Sym's case* (1584), *Cro. Eliz.* 33; 1 *Rolle, Abr.* 344, pl. 10; *Growte v. Lowcroft*, *Moore*, 395.

(b) Si feme, lessee pur an, prist Baron qui puis accept un novel leas pur leur vies, ceo est un surrender del primer leas. 2 *Rolle, Abr.* 495, pl. 50.

(c) *Donne v. Hart* (1831), 2 *Rus. & Myl.* 360. See also *Major v.*

Lansley (1831), 2 *Rus. & Myl.* 355.

In *Box v. Jackson* (1843), 1 *Drur.* 48, Lord Chancellor Sugden said, "He was happy that the doctrine of *Purdew v. Jackson* had not (in *Donne v. Hart*, and *Major v. Lansley*) been extended to chattels real." —See *Purdew v. Jackson* (1823), 1 *Russ.* 1.

(d) 1 *Rop.* 184.

Chap. I. s. 2. the equity of redemption untouched, as in *Pitt v. Pitt* (e), where a *feme sole*, having mortgaged a leasehold for years, afterwards married. The mortgage was then transferred; the husband joining in the transfer, and covenanting to pay the money. During the coverture the husband, by gradual payments out of his own property, reduced the money due upon the mortgage. By his will he made a disposition of the mortgaged premises, and died in the lifetime of his wife. Upon a bill by the wife, who claimed to be entitled by survivorship, to redeem the mortgage, the redemption was decreed to her, upon the terms that the husband's estate should stand in the place of the mortgagee for the sums paid by him out of his own property in reduction of the mortgage debt.

Case of Clarke v. Burgh.

In a case before Vice-Chancellor Knight Bruce (f), it was held that the widow was similarly entitled to the equity of redemption; the transaction showing nothing which betokened an intention on the husband's part of defeating that right. It appeared that he had executed mortgages of his wife's chattel leaseholds. This was considered as dealing with the property only to the extent of the legal interest—the equity of redemption remained unaffected. The following remarks of his Honor put the thing very clearly:—

That these alienations became absolute at law no one can doubt, as the money was not paid at the time appointed. They became absolute at law in the husband's lifetime. It is clear, however, that the assignment has never become absolute in Equity. The only intention on the part of the husband was to give the alienees security for the money advanced. It does not appear to me the wife's rights in Equity are more prejudiced than if a mere deposit of the deeds had been made by the husband. The mortgages are mere pledges or charges, and nothing more.

Principle of this decision.

This decision seems to have proceeded on the principle that, where a husband's mortgage is made by an instrument which discloses no intention of doing more than simply making a mortgage, the Court will regard the proceeding with an inclination to believe that nothing more was intended than that which was necessary to constitute a sufficient security for the

(e) (1823), Turn. & Russ. 180.

(f) *Clarke v. Burgh* (1845), 2 Coll. 221.

money advanced; and not upon the principle that there had not been a reduction of the chattels into the husband's possession (g). In *Mitford v. Mitford* (h), Sir William Grant states:—"There are some legal interests which do not admit or stand in need of being reduced into possession, being in possession already, and not lying in action; as terms of years and other chattels real" (i).

The husband's agreement to mortgage the wife's chattels real was enforced against her only to the extent of the money due (k). Chap. I. s. 2.
Husband's agreement to mortgage.

If the husband were outlawed or attainted, his wife's chattels real were forfeited to the Crown (l); they were also liable to execution for his debts (m). Forfeiture on his outlawry.
Liability for his debt.

All these principles as to the right of the husband to the wife's chattels real during the coverture were swept away by the Married Women's Property Acts, 1882 and 1893 (n), and are now obsolete, except in the case of marriages contracted before the 1st January, 1883, and even then are applicable only to property, the title to which accrued before that date. Present law.

SECTION III.

REAL ESTATE.

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Under both the old and the present law, real estate which before the marriage belonged to the husband continues to belong to him exclusively after the marriage. Husband's real estate.

- (g) See *post*, "The wife's choses in action," and *Purdew v. Jackson* (1823), 1 Russ. 1.
- (h) (1803), 9 Ves. 87.
- (i) See *Box v. Jackson* (1843), 1 Drur. 48, where Lord Chancellor Sugden says the doctrine of *Purdew v. Jackson* has not been extended to chattels real.
- (k) *Bates v. Dandy* (1741), 2 Atk. 207.
- (l) Plowd. 263; 2 Black. 434.
- (m) Co. Litt. 351; 2 Black. 434.
- (n) 45 & 46 Vict. c. 75; and 56 & 57 Vict. c. 63.

Chap. I. s. 3.

Wife's real estate by the old law under the dominion of the husband.

Real estate, on the other hand, which belonged to the wife before the marriage, or might come to her during the marriage, was under the old law placed by the marriage under the dominion of the husband; a dominion, however, limited by and commensurate with the coverture. By the marriage the husband acquired, and during the marriage enjoyed, a freehold interest in his wife's real estate for their joint lives, both being seised together in her right by entireties (*o*), the effect of which was to put the ownership during the coverture entirely in the husband's power. Hence he could alienate that ownership at pleasure, and his conveyance would pass his freehold interest without the wife's co-operation.

So, likewise, he might of course charge such estate of his wife for their joint lives; the charge, however, ceasing with the cesser of the marriage, unless he became entitled as tenant by the curtesy.

But not the fee.

But the ultimate property, that is to say, the inheritance or fee of the estate, was not in the husband, whose marital right was bounded by the coverture. It remained in the wife herself, subject to the husband's rights, and could be dealt with by the joint act only of both the married parties; for the wife was by the disabilities of coverture precluded from disposing of it without her husband's concurrence (*p*).

Which, however, she could not dispose of without her husband's concurrence.

Present law.

By the Married Women's Property Act, 1882 (*q*), this right of the husband to his wife's real estate during the coverture was

(*o*) Litt. s. 291; 1 Inst. 187 b; Tit. 18, c. 1, s. 35; *Owen v. Morgan*, 3 Rep. 5; *Robinson v. Comyns* (1735), Cas. temp. Talb. 164, 167, n. b, where the report of Lord Talbot's observations is corrected on the authority of Mr. Booth, which correction is confirmed by Mr. Butler. In Piggot's Treatise of Com. Rec., p. 72, it is stated that a husband seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, may create an estate of freehold during the coverture, and thereby

make a good tenant to the præcipe. Of this learning, Blackstone, in his popular way, gives the practical result in his Commentaries, vol. 2, p. 433, where he holds, that in the wife's real estate the husband enjoys only a title to the rents and profits during the coverture; for the real estate, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs if she dies before him.

(*p*) As to the method of disposition, see *post*, p. 58.

(*q*) 45 & 46 Vict. c. 75.

abolished, except in the case of marriages contracted before the Chap. I. s. 3.
1st January, 1883, and even then it subsists only in respect of
real estate, the title to which accrued before that date.

SECTION IV.

FRAUD ON THE MARITAL RIGHT, AND REVOCATION OF WILL
BY MARRIAGE.

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The right of the husband to the property of his wife was regarded in the light of a consideration for the burthens imposed upon him by the marriage; and, accordingly, it was held that she ought to do nothing during the matrimonial treaty whereby the marital right might be defeated or impaired. Any secret disposition of her property during the courtship was considered a fraud upon the husband, from the consequences of which he was entitled to be relieved (*r*), even though he did not know of the existence of the settlement, and though ten years had elapsed since the marriage (*s*). The secrecy of the proceeding was a

Secret disposition by wife during treaty of marriage.

(*r*) The leading case on this subject is *Strathmore v. Bowes*, 1 White & Tudor's Eq. Cas. 613, 7th ed.; 2 Bro. C. C. 345; 1 Ves. jun. 22, 28. See also *Howard v. Hooker*, 2 Cha. Rep. 81; 1 Eq. Ca. Abr. 59; *Carlton v. Earl of Dorset*, 2 Vern. 17, where, so early as 1686, it was decided that a settlement made by a woman before her marriage for her separate use, without the husband's privity, was void as against him. A secret

settlement made by a woman whilst under a treaty of marriage, though liable to be set aside in equity, was not necessarily void at law: *Doe d. Richards v. Lewis* (1852), 11 C. B. 1035. As to where the fraud related to a chose in action of the wife's not reduced into possession by the husband, see *Grazebrook v. Percival* (1850), 14 Jur. 1103.

(*s*) *Goddard v. Snow* (1826), 1 Russ. 485.

Chap. I. s. 4. material element from which fraud might have been inferred (*t*); for it did not appear necessary to make out a case of actual and positive deception (*u*). However, a conveyance made, even immediately before marriage, was *prima facie* good (*x*), and could be impeached only on proof of fraud; and the establishment of such fraud depended on the circumstances of each case.

Secus, if before the treaty and meritorious.

If the transaction were before the marriage treaty (*y*), or if the transaction took place while the treaty of marriage was in progress, and it might be inferred that the husband had notice of it before his marriage, he could not impeach it (*s*).

The marital right of the husband was also held to be excluded where a voidable settlement of the wife's property had been made on a previous marriage, if it had been adopted by the wife while discovert (*a*), or by her and her husband during the second coverture (*b*).

And still more if he concurred in it.

Actual concurrence on the part of the intended husband, in a settlement made by the wife before marriage, will be still more conclusive against him (*c*); and, even though he were a minor, will preclude all subsequent allegations of fraud on the marital right (*d*). In a modern case (*e*), however, the decision in *Slocombe v. Glubb* was explained by Lord Selborne, L. C., as resting on the principle that the husband who took a benefit under the settlement could not reject it in part and accept it in part (*f*).

(*t*) *England v. Downs* (1840), 2 Beav. 522.

(*u*) *Taylor v. Pugh* (1842), 1 Hare, 608.

(*x*) Per Lord Langdale in *England v. Downs* (1840), 2 Beav. 522. But see 1 Roper, 166, where Mr. Jacob in a note says, "a conveyance made during the treaty of marriage is *prima facie* fraudulent."

(*y*) *King v. Cotton* (1732), 2 P. Wms. 675.

(*z*) *St. George v. Wake* (1833), 1 Myl. & Kee. 610. See also *Griggs v. Staplee* (1848), 2 De G. & Sm. 572; *Wrigley v. Swainson* (1849), 3 De G. & Sm. 458.

(*a*) *Ashton v. M'Dougall* (1842),

5 Beav. 56.

(*b*) *White v. Cox* (1876), 2 Ch. D. 387.

(*c*) *Maber v. Hobbs* (1836), 2 Y. & C. Ex. 317; *Ashton v. M'Dougall* (1842), 5 Beav. 56; *Loader v. Clarke* (1850), 2 Mac. & G. 382.

(*d*) *Slocombe v. Glubb* (1789), 2 Bro. C. C. 545. See however *Nelson v. Stocker* (1859), 4 De G. & J. 458.

(*e*) *Kingsman v. Kingsman* (1880), 6 Q. B. D. 122.

(*f*) As to settlements made under the provisions of the Infants Settlements Act, 1855 (18 & 19 Vict. c. 43), together with cases, see Chitty's Statutes, tit. "Infants and Children," pp. 12, 13.

If a woman about to marry parted with or charged her property, or contracted a debt for valuable consideration, though the transaction were concealed from the intended husband, it was no fraud on the marital right (*g*). Chap. I. s. 4.

The husband seeking redress was bound to show, not only that a marriage was contemplated by his wife at the time of the disposition of her property, but that *he* was the person intended (*h*). It must be a fraud on the particular husband complaining.

It would seem that a fraud on the marital right of the husband might have been committed by a woman about to be married who, without the knowledge of her husband, transferred property into her intended name "as a married woman entitled to her separate use" under sects. 3, 4 or 5 of the Married Women's Property Act, 1870. Effect of Act of 1870 on this doctrine.

The foregoing summary is of practical importance only in cases where the marriage has taken place prior to the 1st January, 1883, as under the present law, the marital right being abolished, there can be no fraud committed upon the husband. Unimportant since 1st Jan. 1883.

The marital right was also protected against any disposition by will made by a woman before her marriage; for by the 1 Vict. c. 26, s. 18, which, so far as women were concerned, was declaratory of the existing law, it was enacted:—

That "every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, executor, or administrator, or the person entitled as his next of kin under the Statute of Distributions)." Wills revoked by marriage.

This applies to all wills made after the 1st January, 1838 (*i*).

Before the passing of this Act, a will made by a woman *dum sola* was revoked by her subsequent marriage; but when a man made a will, it was not revoked by his subsequent marriage alone, but was revoked by marriage and the birth of a child. The principles on which the distinctions rested are ably ex- Law before the Wills Act.

(*g*) *Blanchet v. Foster* (1751), 2 Ves. sen. 264; *Llewellyn v. Cobbold* (1853), 1 Sm. & Giff. 376. (*h*) *England v. Downs* (1840), 2 Beav. 522.

(*i*) See *Martin, In re, Loustalan v. Loustalan*, (1900) P. 211 (C. A.).

Chap. I. s. 4. pounded by Sir E. V. Williams in his valuable work on Executors and Administrators (*k*).

Submission to arbitration. A submission to arbitration was formerly revoked if one of the parties, being a single woman, married before the award (*l*); and it made no difference that the arbitrator in making his award had no notice of the marriage (*m*).

Warrant of attorney. It was said, but not without reasons to the contrary, that if the wife, *dum sola*, executed a warrant of attorney, it was revoked by her subsequent marriage (*n*); but on the other hand, that if she *accepted* a warrant of attorney, it was not revoked by her subsequent marriage; and that the Court would give leave to enter up judgment upon it (*o*). Under the old law the marriage constituted a breach of the covenant to abide by the award, for which damages could have been recovered in an action against the husband and wife (*p*); but now the submission to arbitration is no more revoked by the marriage of a woman than of a man.

(*k*) 10th edit.

(*l*) Com. Dig. Arbitrament, D. 5;
Andrews v. Palmer (1821), 4 B. &
Ald. 250, p. 252; *M'Cann v.*
O'Ferrall (1840), 8 Cl. & F. 30.

(*m*) 1 Bac. Abr. 270; *Charnley*

v. Winstanley (1804), 5 East, 266;
2 Rep. 72.

(*n*) 2 Rep. 68.

(*o*) *Marder v. Lee* (1764), 3 Burr.
1469.

(*p*) *Charnley v. Winstanley* (1804),
5 East, 266.

SECTION V.

WIFE'S CHOSSES IN ACTION.

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It is still important to consider the law relating to the choses in action of the wife as it existed before the recent Act: for where the marriage took place, *and* the title of the wife accrued, before 1st January, 1883, the rights of the parties depend upon the law as it stood prior to that date. In all other cases choses in action being by the Married Women's Property Act, 1882 (*q*), included in the term "property" (*r*), a married woman is entitled to recover and hold her choses in action as if she were a *feme sole*, and the marital right of the husband to these, as well as to all other kinds of property, is during the coverture wholly

(q) 45 & 46 Vict. c. 75.

(r) *Ibid.* s. 24.

Chap. I. s. 5.

excluded; but where the husband survives the wife, and her choses in action are not disposed of by her will or otherwise, it would appear that the Act of 1882 has not deprived him of his right to them; but that, in order to recover them, he must take out administration to his wife in the same way as before the passing of the Act (*s*).

Her right not divested by marriage.

The right which the wife had to her choses in action was not divested by marriage, but was liable to be divested by an act done in the marriage state; that is to say, the husband might appropriate his wife's choses in action by reducing them into possession. In this way, and in this way only, could he divest her right of property and defeat her claim by survivorship (*t*).

Choses in action different from chattels in the hands of third parties.

The wife's choses in action are not to be confounded with her goods or specific chattels in the hands of third parties, the property in which was by the marriage taken out of her and vested in her husband; whereas the right which before the marriage she had to her choses in action remained in her, notwithstanding the marriage, unless something were done in the marriage state, whereby that right was put an end to (*u*).

What are choses in action.

Choses in action are defined by Coke "as debts by obligation, contract, or otherwise" (*x*); and by another old writer as "Things for which a man hath a cause, or may bring an action for on the ground of some duty due to him, as an action of debt upon an obligation, annuity or rent, . . . Trespass of goods taken away, beating or such like; and because they are things whereof a man is not possessed, but for receiving of them is driven to his action, they are called Things in Action" (*y*). The exigencies of modern life have, however, largely extended the meaning of this term, which is now held to denote all forms of incorporeal personal property not actually reduced into possession, com-

(*s*) See *post*, "Rights arising from the dissolution of the marriage."

(*t*) *Gaters v. Madeley* (1840), 6 M. & W. 423; *Sherrington v. Yates* (1844), 12 M. & W. 855; *Prole v. Soady* (1868), L. R., 3 Ch. 220; *Aitchison v. Dixon* (1870), L. R., 10 Eq. 589; *Scrutton v. Pattillo*

(1875), L. R., 19 Eq. 369. The assignee of the husband was in this respect in the same position as the husband. See *post*.

(*u*) *Hutchings v. Smith* (1838), 9 Sim. 137.

(*x*) Coke on Littleton, 351 b.

(*y*) *Termes de la Ley*.

prising shares in a partnership or a company, copyrights and patents (z), and policies of insurance (a). Chap. I. s. 5.

It also includes a claim for damages in respect of a tortious act, within the meaning of the Judicature Act, 1873, and is therefore assignable under sect. 25, sub-sect. 6, of that statute (b).

Although the property in the wife's choses in action was not changed by the marriage, yet by the marriage the husband acquired a power of suing for and recovering them, and so making them his own, by converting them in fact into chattels personal in possession; and payment ought, during the marriage, to be made to the husband, not to the wife, except as his agent.

The law on the subject of the wife's choses in action was thus stated by Sir Thomas Plumer in *Purdew v. Jackson* (c).

Marriage (he says) is only a qualified gift to the husband of the wife's choses in action upon condition that he reduce them into possession during its continuance. The wife's right is not divested by the marriage. The chose in action continues to belong to her; so that, if the husband happen to die before his wife, she, and not his personal representative, will be entitled to it. The husband, therefore, acquires no right to his wife's chose in action. Reduction into possession is a necessary and indispensable preliminary to his having any right of property in himself, or to his being able to convey any right of property to another. If he does not perform this condition in his lifetime, the right of his widow after his death continues unaltered, exactly as if she had never married (d).

Marriage did not operate as a severance of the wife's joint tenancy in any species of property, except possibly chattels personal (e), and, of course, in the case of marriages since the Married Women's Property Act, 1882 (f), as the wife's property remains her own, no severance will in any case take place.

Whether the chose in action had been reduced into possession Reduction
into possession.

(z) *Colonial Bank v. Whinney* (1885), 30 Ch. D. 261, C. A.; note especially Fry, L. J., p. 285.

(a) *King v. Victoria Ins. Co.*, (1896) A. C. 250.

(b) *Dawson v. Great Northern and City Ry.* (1904), 21 T. L. R. 114, C. A. For a comprehensive list of choses in action in the modern sense

of the term, see Warren on Choses in Action (1899), pp. 19—26.

(c) (1823), 1 Russ. 1.

(d) See Jacob's note to 2 Roper, 521, where the above is confirmed. See, however, *Re Biaggi*, W. N. 1882, p. 65.

(e) *Armstrong v. Armstrong* (1869), L. R., 7 Eq. 518.

(f) 45 & 46 Vict. c. 75.

Chap. I. s. 5. was in each case a question of fact; but "nothing has ever been held to amount to reduction into possession of a wife's *chose in action* which does not give the husband for some moment of time absolute dominion over the property without any concurrence of the wife" (g).

Effect of
termination of
coverture.

The right of a husband to reduce his wife's choses in action into possession is terminated by dissolution of the marriage (h), or judicial separation (i); and, on the death of the divorced wife, her executors, and not the husband or his assignees, are entitled to a fund not reduced into possession (k). The order absolute takes effect from the date of the decree *nisi*; and, accordingly, reduction into possession by the husband during that interval is ineffectual to defeat the title of the wife (l).

A wife who had obtained a protection order, under 20 & 21 Vict. c. 85, s. 21, since in such a case the marriage subsists, was able to give a good receipt for a legacy bequeathed to her (m).

The reduction into possession of his wife's chose in action must be effected by the husband while he retains that character, and the cases, which decide that the husband's right of reduction into possession is terminated by divorce, stand on a different footing from those in which the effect of divorce upon marriage settlements is considered. The husband had the right to reduce the choses in action of his wife into possession, because he filled the character of husband at the time; whereas the rights and interests under a settlement are fixed at the date of its execution. In dealing with the latter class of questions, the Court seems to have been occasionally misled by the analogy of the cases

(g) Per Fry, J., in *Nicholson v. Drury Buildings Estate Co.* (1877), 7 Ch. D. 48, at p. 55. It would be sufficient if the fund was at any moment in the hands of a person against whom the husband might have brought an action for money had and received to his use: *Aitchison v. Dixon* (1870), L. R., 10 Eq. 589.

(h) *Wells v. Malbon* (1862), 31 Beav. 48; *Heath v. Lewis* (1864), 4

Giff. 665.

(i) *Re Insole* (1865), L. R., 1 Eq. 470; *Johnson v. Lander* (1869), L. R., 7 Eq. 228. See 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8.

(k) *Wilkinson v. Gibson* (1867), L. R., 4 Eq. 162.

(l) *Prole v. Soady* (1868), L. R., 3 Ch. 220.

(m) *Re Coward and Adams' Purchase* (1875), L. R., 20 Eq. 179.

relating to choses in action, but it is now settled that the husband's rights under a settlement are not forfeited by the dissolution of the marriage (*n*). Chap. I. s. 5.

It has, however, been held that a restriction, in a post-nuptial settlement, of the enjoyment of benefits conveyed thereunder, to the period of cohabitation is not void as against the policy of the law; and that, in the case of a wife, the trust in her favour automatically determined upon her ceasing to live with her husband (*o*).

As to the power of the Court, after a final decree for dissolution of the marriage, to vary the provisions of a settlement, see sect. 5 of the Matrimonial Causes Act, 1859, and sect. 3 of the Matrimonial Causes Act, 1878. The latter enactment has been decided to be retrospective (*p*).

What should be a sufficient reduction into possession by the husband to bar the wife's survivorship is to be collected from the cases. Mere intention would not do. There must have been *acts*; and those acts must have had the effect of divesting the right of property in the wife and establishing it in the husband absolutely (*q*). Thus a sale by a husband of his wife's chose in action was a reduction into possession by him (*r*). Reduction into possession.

But the mere fact of the marriage of a woman who was one of several joint tenants of a chose in action would not automatically operate as a severance of such joint tenancy so as to vest the ownership in her husband.

It was requisite that there should be some distinctly overt act on his part indicative of intention to assume absolute dominion

(*n*) *Evans v. Currington* (1860), 2 D. F. & J. 481; *Fitzgerald v. Chapman* (1875), 1 Ch. D. 563; *Burton v. Sturgeon* (1876), 2 Ch. D. 318; overruling *Jessop v. Blake* (1862), 3 Giff. 639; *Swift v. Wenman* (1870), L. R., 10 Eq. 15; and *Fussell v. Dowding* (1872), L. R., 14 Eq. 421.

(*o*) *Hope-Johnstone, In re, Hope-Johnstone v. Hope-Johnstone*, (1904) 1 Ch. 470.

(*p*) *Ansdell v. Ansdell* (1880), 5

P. D. 138; see however *Yglesias v. Yglesias* (1878), 4 P. D. 71. As to general rules governing variation of settlements, see *post*, p. 194.

(*q*) *Blount v. Bestland* (1800), 5 Ves. 515; *Howard v. Oakes* (1848), 18 L. J., Ex. 485; *Bird v. Pegrum* (1853), 22 L. J., C. P. 166; *Att.-Gen. v. Partington* (1864), 33 L. J., Ex. 281; *Rawlins v. Birkett* (1856), 4 W. R. 795.

(*r*) *Widgery v. Teppir* (1877), 7 Ch. D. 423, C. A.

Chap. I. s. 5. over the property, in order to divest it out of the wife and vest it in him (s).

How wife's chose in action recovered.

Where an action was necessary in order to reduce a chose in action of the wife into possession, it had to be brought in the names of both the husband and the wife (t), but if she died pending the action, it was held that it abated (u).

Wife's negotiable securities.

As to the wife's negotiable securities, however, as bills of exchange and promissory notes, which were made payable to her when *sole*, the rule was different. The husband alone, and not the wife, could indorse them, and, by so doing, give his indorsee the right of suing on them in his own name (x). He was, therefore, held to have the same right in himself; for he alone, and not his wife, could recover payment of them. She was not necessarily joined in the action as co-plaintiff (y). Still, if the husband died without having reduced them into possession, these securities would, as choses in action, survive to the wife (z).

When judgment survived to the wife.

It was held that, if the wife were a co-plaintiff in an action for the recovery of a chose in action, and the husband died after judgment, but before the suing out of execution, the judgment would survive to her (a).

On the other hand, if before the marriage the wife had

(s) *Butler's Trusts, In re* (1888), 38 Ch. D. 286, C. A.

(t) Per Lord Kenyon, C. J., in *Milner v. Milnes* (1790), 3 Term Rep. 631. When the chose in action accrued due, not while the wife was *sole*, but during the coverture, it has been said that it is optional in the husband to join his wife as co-plaintiff. But in *Wills v. Nurse* (1834), 1 Adol. & Ell. 65, Tindal, C. J. (delivering the judgment of the Exchequer Chamber on a writ of error), said:—"This case resembles that of a bond given to the wife during coverture. The interest of the wife forms a substratum upon which her right to join in an action may be founded." See also *Hart v. Stephens* (1845), 6 Q. B.

Rep. 937. But see *infra*, "Rights arising from the dissolution of the marriage by the death of the husband," and "by the death of the wife," pp. 117 and 150.

(u) *Checchi v. Powell* (1827), 6 Barn. & Cres. 253.

(x) *Barlow v. Bishop* (1801), 1 East, 432; 1 Rep. 214.

(y) *M'Neilage v. Holloway* (1818), 1 Barn. & Ald. 218; *Exp. Barber* (1821), 1 Glyn & Ja. 1.

(z) *Howard v. Oakes* (1848), 3 Ex. 136; *Gaters v. Madeley* (1840), 6 M. & W. 423; *Richards v. Richards* (1831), 2 B. & Ad. 447; *Sherrington v. Yates* (1844), 12 M. & W. 855.

(a) 1 Rep. 212, and the cases there cited.

obtained a judgment, and she and her husband sued out a Chap. I. s. 5.
scire facias, and obtain an award of execution, the property
would belong to the husband (b).

As a joint judgment would survive to the wife if her husband died before execution were awarded, so would a joint decree, unless an order had been obtained to pay the money to the husband, or declaring that it belonged to him (c). Effect of joint decree.

Costs ordered by rule of Court to be paid to husband and wife were held to survive to her (d). But where an award was expressly to *pay to the husband*, and, before any further proceedings, he died, his wife's claim was held to have been defeated (e).

The effect of the husband's failure to reduce the wife's choses in action into possession was, that in the event of his predeceasing her, she was entitled to them by survivorship; and in the event of her predeceasing him, he, in order to get at them, had to take out administration to her (f). Effect of failure to reduce into possession.

If, after the wife's death, the husband died before her outstanding personal chattels were recovered, his next of kin were entitled to them in equity. In a case, therefore, where the wife had been a mortgagee in fee, her surviving husband was held entitled to the mortgage as her administrator, and her heir was considered to be a trustee for him (g).

The husband's power of reducing his wife's chose in action into possession was assignable; but always subject to the wife's right by survivorship (h). The value of the assignment, therefore, depended upon its being made available by reduction into possession before the wife's claim could arise. For it was settled that all such assignments, whether by operation of law or by the act of the husband, passed only the interest which the husband Assignment in equity.

(b) 1 Rep. 212.

(c) 1 Rep. 216; 10 Ves. 91; and see *Heygate v. Annesley* (1791), 3 Bro. C. C. 362.

(d) *Tilt v. Bartlett* (1754), 1 Kenyon's Notes, 104.

(e) *Oglander v. Baston* (1686), 1 Vern. 396; 1 Rep. 219.

(f) See further on this subject, "Rights arising from the dissolution of the marriage by the death of the husband;" and "by the death of the wife," *post*, pp. 117 and 150.

(g) *Turner v. Crane* (1683), 1 Vern. 170; 1 Rep. 205.

(h) *Whittle v. Henning* (1848), 2 Phill. 731.

Chap. I. s. 5. himself had in the subject-matter; namely, an interest liable to be defeated by his death before reduction into possession, leaving his wife him surviving (*i*).

Accordingly, the assignee was in no better situation than the assignor; and he, too, must have reduced the subject into possession, in order to make his title good against the wife surviving (*k*).

The chose in action might be of such a nature as not to admit of immediate reduction into possession; for example, where it consisted of a reversionary interest in a trust fund: the position of the assignee then depended upon the time when the chose in action became capable of such reduction.

Having regard to this condition, three cases arose, which are referred to in the following passage from Lord Lyndhurst's judgment in *Honner v. Morton* (*l*):—

"If at the time of the assignment he is in a condition to reduce the chose in action into possession, the assignment operates immediately. If he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative."

Where, neither at the time of the assignment nor afterwards, it was capable of reduction into possession.

The last of these cases is, where the husband had, neither at the time of the assignment, nor subsequently, the power of reducing the chose in action into possession. Suppose that the husband and wife concurred in assigning to a purchaser for valuable consideration, a fund in which she had a vested interest in remainder expectant on the death of a tenant for life; and suppose, furthermore, that the tenant for life outlived the

(*i*) *Purdew v. Jackson* (1823), 1 Russ. 1.

(*k*) The interest of the assignee was similarly defeated, if a decree of dissolution of marriage (*Prole v. Soady* (1868), L. R., 3 Ch. 220), or judicial separation (*Johnson v. Lander* (1868), L. R., 7 Eq. 228), or a protection order (*Re Coward and Adams' Purchase* (1875), L. R., 20 Eq. 179; *Nicholson v. Drury*

Buildings Estate Co. (1877), 7 Ch. D. 48), were obtained before the reduction into possession of the chose in action, which, in any of those cases, became the absolute property of the wife, as if she were a *feme sole*, even though she might have joined with her husband in a mortgage of the chose in action: *Re Insole* (1866), L. R., 1 Eq. 470.

(*l*) (1828), 3 Russ. 65, p. 86.

husband. Here the wife surviving would be entitled to the fund (m). Chap. I. s. 5.

Secondly, take the case where, although the husband had not the power of reducing the property into possession at the time of the assignment, he acquired that power subsequently. In *Ashby v. Ashby* (n), the husband assigned his wife's reversionary chose in action to a particular assignee for value. He survived the person on whose life the reversion depended; and, therefore, reduction into possession might well have taken place. Yet, inasmuch as he died before the property was actually recovered, the assignment was, by Vice-Chancellor Knight Bruce, held to be void against the surviving wife (o). Where it became capable of such reduction after the assignment.

In the third case, i.e., where, both at the time of the assignment and subsequently, the husband had full power to reduce the property into possession, it was well established that the assignee must, as in every other case, perfect his title by reducing the chose in action into possession during the coverture. He took only what the husband could assign, and it would be "strange if a man should in any way be able to transfer to another a larger or better interest than he had in himself" (p). Where, both at the time of the assignment and afterwards, it was capable of such reduction.

The wife's life interest in a trust fund, so far as the annual payments which might accrue after the death of her husband are concerned, was a chose in action which could not be reduced into possession during the coverture; and, in accordance with the decisions in *Purdew v. Jackson* and *Honner v. Morton*, it was held that neither the husband alone, nor the husband and wife together, could dispose of such an interest beyond the duration of the coverture (q). Wife's life interest in trust fund.

In the case of *Hore v. Becher* (r), a single woman, being Effect of a release.

(m) *Purdew v. Jackson* (1823), 1 Russ. 1; *Honner v. Morton* (1828), 3 Russ. 65. See *Duberly v. Day* (1852), 16 Beav. 33.

(n) (1844), 1 Coll. 553.

(o) His Honor in so ruling relied upon a case with which, he said, his own opinion agreed, namely, *Ellison v. Elwin* (1843), 13 Sim. 309. See also *Hutchings v. Smith* (1838), 9 Sim. 137; *Micheltmore v. Mudge*

(1860), 2 Giff. 183.

(p) Per Sir W. Grant, in *Mitford v. Mitford* (1803), 9 Ves. 87. See also *Hutchings v. Smith* (1838), 9 Sim. 137; *Le Vasseur v. Scrutton* (1844), 14 Sim. 116.

(q) *Stiffe v. Everitt* (1835), 1 Myl. & Cr. 37; *Harley v. Harley* (1852), 10 Hare, 325.

(r) (1844), 6 Jur. 93; 11 L. J. (N. S.) 153.

Chap. I. s. 5. entitled to an annuity for her life, secured by bond, married: and her husband executed a *release* of the bond and died. It was decided that the widow's claim to the future payments of the annuity for her life was barred by the husband's release. With reference to *Stiffe v. Everitt*, Shadwell, V.-C., remarked in this case:—

“*That was a case of assignment.* There is a difference between an assignment and a release. The question there was, whether the husband could pass that right in a chose in action which should survive to the wife after the death of the husband. But here the question is, what is the effect of a release? It is material that the law should be clearly understood on this point. If anything is secured by bond or otherwise to a woman who afterwards marries, the husband may then release the security; and if he releases the security, there is an end to the annuity” (s).

Release as inoperative as assignment.

It was, however, settled by the decision in *Rogers v. Acaaster* (t), that the release by the husband of the wife's reversionary chose in action was as inoperative as his assignment to bar the wife's right by survivorship. In the judgment, Sir J. Romilly, M. R., observed:—

“Where personal property is vested in possession in a husband in right of his wife, he can pass it by assignment; but when a present debt is owing to his wife he may either receive the debt or release the obligation. Thus, in the case of a bond conditioned to pay either a sum down or an annuity for life, I understand that the husband might release the bond, and that, the security being released, there could be no claim after his death; but I do not understand that, in any of the cases cited, it has ever been held that a husband can release a debt which is not due to the wife, but in respect of which the wife may hereafter have an interest. There is a great distinction between a debt due to the wife with an immediate

(s) It may be assumed that the difference between an assignment and a release has now been entirely abrogated. It seems to have been only with reference to choses in action that the doctrine was of any importance, and was founded upon the fact that choses in action were not assignable at law. But now, by the Judicature Act, 1873, sect. 25 (6), choses in action may be assigned by writing under the hand of the assignor, provided that the

assignment is not by way of charge only, and that notice thereof is given to the debtor.

(t) (1851), 14 Beav. 445. See also *Fitzgerald v. Fitzgerald* (1868), L. R., 2 P. C. 83, where Wood, L. J., in delivering the judgment of the Court, said that the case of *Hore v. Becher* could scarcely be reconciled with the doctrines of a Court of Equity as to the inalienable character of a wife's reversionary interest.

right of action, and a right of action which may arise at a future time. **Chap. I. s. 5.**
 Suppose such a case as this:—A covenant to a wife to pay a sum of money on the death of her husband. Here there is a present obligation, but no right of action until the breach by non-payment after the death of the husband. Could the husband release such an obligation? I apprehend he clearly could not, and no authority has been cited for any such right."

The Court had no authority to enable the husband, or the husband and wife together, to dispose of her reversionary choses in action, even although she were examined in Court, and were to express her consent that the transfer should be made. Thus, in *Wade v. Saunders* (u), Sir Thomas Plumer, about a year after his decision in *Purdey v. Jackson*, refused to take the consent of a married woman to give up her reversionary interest, in part vested and in part contingent, in a fund in Court, in favour of a purchaser from her husband (x). Effect of wife's consent in Court.

"A wife by her consent in a Court of Equity can only depart with that interest which is the creature of a Court of Equity—the right, which she has in a Court of Equity, to claim a provision, by way of settlement on herself and children, out of that property which the husband at law would take in possession in her right. Her equity arises upon his legal right to present possession. This principle has no application to a remainder or reversion" (y).

It was decided in *Whittle v. Henning* (z), that a wife's reversionary interest in a chose in action could not be accelerated by the assignment to her of all the prior interests, so as to vest in her an absolute and assignable property. Lord Cottenham, L. C., in his judgment, said:— Assignment not permitted by collusion with prior owners.

"It is true that the wife in this case has not only a present life interest from her husband, but the ultimate interest in the fund from her son, and therefore, it is said, has a present absolute title to the whole. This proposition assumes that her reversionary life interest no longer exists; that it is in fact merged in the other interests so conferred upon her by her husband and son. But this can only prevail if the Court should, by analogy to law, establish an equitable merger for the sole purpose of

(u) (1823), Turn. & Russ. 306.

Ves. 174; *Box v. Jackson* (1843), Drury, 42.

(x) See *Whittle v. Henning* (1848), 2 Phill. 731. See also *Richards v. Chambers* (1805), 10 Ves. 580; *Woollands v. Crowcher* (1806), 12

(y) Per Sir J. Leach, in *Pickard v. Roberts* (1818), 3 Mad. 385.

(z) (1848), 2 Ph. 731.

Chap. I. s. 5. depriving the wife of this protection to her reversionary interest which it has hitherto afforded" (a).

Effect of Act
1882.

The wide-reaching effects of the Married Women's Property Act, 1882, are particularly noticeable in cases like the above. Prior to the passing of this Act, as already stated, a Court in the exercise of its discretion, and for the protection of the wife, might and probably would refuse to sanction the merger of a present interest of a property settled upon trust for a married woman for life for her separate use, with a remainder over to such persons as she shall by will appoint, or in default of appointment, for herself absolutely, as a merger of such interests would place the *corpus* in the power of her husband.

But since the passing of the Act of 1882, the above difficulty disappears, owing to the wife being now as regards her separate estate a *feme sole*. Consequently, in such cases, the reversion as well as the estate for life are now alike settled upon her for her separate use without her husband having any power over their disposition (b).

Effect of
husband's
bankruptcy.

Upon the bankruptcy of the husband, all his interest in his wife's choses in action vested in his trustee; but this assignment by operation of law was subject to the same condition as attached to any other assignment, that is to say, its operation could only be perfected by the actual reduction into possession of the chose in action during the coverture (c). The trustee, moreover, could not maintain an action in his sole name for the recovery of such property, but should sue in the joint names of himself and the wife. And if the husband died before execution, the wife could carry on the action for her own benefit (d).

(a) See also *Story v. Tonge* (1844), 7 Beav. 91; *Brandon v. Woodthorpe* (1847), 10 Beav. 463. The decision in *Whittle v. Henning* has overruled *Lachton v. Adams* (1836), 5 L. J., Ch. 382; *Creed v. Perry* (1845), 14 Sim. 592; and *Hall v. Hugonin* (1845), *ibid.* 595.

(b) *Davenport, In re, Turner v. King*, (1895) 1 Ch. 361.

(c) See *ante*, p. 35; *Pierce v. Thoruley*, (1828) 2 Sim. 167. As to separate property of wife, see *Whitehead, Exp., Whitehead, In re* (1885), 14 Q. B. D. 419.

(d) *Sherrington v. Yates* (1844), 12 Mee. & W. 855; *Hart v. Stephens* (1845), 6 Q. B. 937; *Scarpellini v. Atchison* (1845), 7 Q. B. 864.

In 1857 an Act (e) was passed which enabled a married woman by deed to dispose of reversionary interests in personal estate, to which she is entitled under any instrument made after the 31st December, 1857, not being a settlement made on the occasion of her marriage, as fully and effectually as she could do if she were a *feme sole*. The husband must concur in the deed by which such disposition is made, and it must be acknowledged by her in the manner prescribed by the Act for the Abolition of Fines and Recoveries (f). Compliance with these provisions as to acknowledgments is apparently, however, not necessary in the case of separate estate (g).

When a married woman is entitled, by virtue of an appointment made since the 31st December, 1857, under a power in an instrument executed before that date, her interest is not one which can be disposed of under the Act; the later deed being regarded as incorporated in that from which it derives its efficacy (h).

By an assignment duly made under this statute, a married woman is enabled to transfer personal property to which she is entitled in reversion, discharged from her husband's *jus mariti*, as fully and effectually as if she were a *feme sole*, and an absolute title is thereby given to the assignee (i).

(e) 20 & 21 Vict. c. 57, commonly called "Sir R. Malins' Act." App. 64.

(f) 3 & 4 Will. 4, c. 74, and in Ireland 4 & 5 Will. 4, c. 92. See *Re Butler's Trusts* (1869), 3 Ir. R., Eq. 138. This Act still applies to interests which accrued before 1st Jan. 1883.

(g) *Onslow, In re* (1888), 39 Ch. D. 622; *Pride v. Bubb* (1871), 7 Ch. 16 Eq. 481.

(i) See judgment of Lord Selborne in *Re Batchelor* (1873), L. R., 16 Eq. 481.

SECTION VI.

THE WIFE'S EQUITY TO A SETTLEMENT.

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Doctrine of wife's equity to a settlement.

Closely connected with the subject of the wife's choses in action, and other property devolving upon her during coverture, and the rights of the husband therein, was the doctrine of the wife's equity to a settlement. It may be observed that the law of England furnishes no direct method whereby a husband can be compelled to maintain his wife; but from early times the old Court of Chancery asserted a jurisdiction in favour of the wife; and, wherever a husband sought the aid of equity to enable him to obtain the wife's property, the assistance of the Court was withheld, unless and until a provision was made out of the property for the wife, if she required it. The foundation of the right seems to have been the control which Courts of Equity exercised over property falling under their dominion, together with the principle that he who comes into equity must do equity (k).

In the earlier editions of this work, the subject of the wife's equity to a settlement received full and detailed consideration; it is now treated concisely, for the recent Act has almost

(k) For principles governing this right, see *Briant, In re, Poulter v. Shackel* (1888), 39 Ch. D. 471, and cases mentioned therein.

abolished the practical importance of this branch of law. The Chap. I. s. 6.
doctrine, it must be observed, has no application to separate property, that being effectually secured for the use of the wife.

By the Married Women's Property Act, 1882, all the property of women married on or after the 1st January, 1883, and all the property of women previously married, the title to which shall have accrued after that date, is declared to be their separate property. It is, therefore, only in cases of marriages contracted and property acquired, before the 1st January, 1883, that questions as to the wife's equity can now arise (*l*). Effect of Married Women's Property Act, 1882.

This equity of the wife to a settlement or provision out of a fund, arose when the interest claimed by the husband in right of his wife was merely equitable (*m*), or where, though legal, it became the subject of a suit in equity. It attached only to property which the husband took in right of his wife, not to property which the wife took in her own right (*n*), and to property to which the wife became entitled before (*o*) as well as after marriage (*p*). It was an obligation which the Court fastened not upon the property but upon the right to receive it; and until this equity was satisfied, no part of the fund, which the husband sought to recover, could be set off against a debt due by him (*q*). When the equity arose.

The equity attached to all property which the husband was To what it attached.

(*l*) Questions as to the wife's equity may also occasionally arise, where a husband, whose domicile is foreign, seeks to obtain possession of a fund in the custody of the English Court. See, however, cases cited, *post*, p. 53.

(*m*) As in the case of an equitable estate in fee, *Smith v. Mathews* (1860), 3 De G., F. & J. 139, or where, for example, a fund is vested in trustees who have the legal estate, the wife, or rather the husband in her right, having only the equitable or beneficial interest. In *Ruffles v. Alston* (1875), L. R., 19 Eq. 546, a doubt was expressed whether in some cases a wife might not be en-

titled to her equity to a settlement out of a legal debt.

(*n*) *Life Association of Scotland v. Siddal* (1861), 3 De G., F. & J. 271, 276.

(*o*) *Taunton v. Morris* (1878-9), 8 Ch. D. 453; 11 Ch. D. 779.

(*p*) *Barrow v. Barrow* (1854), 18 Beav. 529.

(*q*) *Carr v. Taylor* (1805), 10 Ves. 574; *Exp. O'Ferrall* (1822), 1 Glyn & J. 347; *McCormick v. Garnett* (1854), 2 Sm. & Giff. 37; *Knight v. Knight* (1874), L. R., 18 Eq. 487; *Re Cordwell's Estate* (1875), L. R., 20 Eq. 644. See also *Osborne v. Morgan* (1878-9), 9 Hare, 432.

Chap. I. s. 6. entitled to receive in right of his wife, and as well to property in which she had only a life interest (*r*), as to that in which she had an absolute interest. It attached also to a term held in trust for the wife (*s*). As the equity was founded upon the right to present possession, no settlement could be claimed out of property in remainder or in reversion, until it fell into possession (*t*). For the same reason that the property must have been property to which the husband was entitled in right of his wife, it was held that where the interest of a husband and wife was that kind of joint tenancy called a tenancy by entireties, as in the case of a legacy to a husband and wife (*u*), there was no equity to a settlement.

In *Ward v. Ward* (*x*), where an annuity was settled on the husband and wife during their joint lives, it was held that the husband took the whole income during the joint lives, and that the wife had no equity to a settlement; but in the case of a capital sum or legacy given in such terms, the contingent interest of the wife as survivor was preserved, and the husband was not allowed to defeat it by alienation in her lifetime (*y*). The wife had no equity to a settlement out of arrears of income which the husband was entitled to receive as it became due (*z*). But in determining what arrears were to be subject to this rule, the Court had regard to the date of the institution of the suit, and exercised its discretionary jurisdiction in respect of those arrears which might have accrued subsequently to that date (*a*).

(*r*) *Taunton v. Morris* (1851), 8 Ch. D. 453; 11 Ch. D. 779; and see *Watkins v. Watkins* (1740), 2 Atk. 96; *Wright v. Morley*, 11 Ves. 12; *Colmer v. Colmer* (1728-9), Mos. 113, 118; *Sleech v. Thornington* (1754), 2 Ves. sen. 560; *Peters v. Grote* (1835), 7 Sim. 238; *Coster v. Coster* (1836), 1 Keen, 199; *Gilchrist v. Cator* (1847), 1 De G. & S. 188; *Re Ford* (1863), 32 Beav. 621.

(*s*) *Sturgis v. Champneys* (1839), 5 My. & Cr. 97; *Hanson v. Keating* (1844), 4 Hare, 1.

(*t*) *Osborne v. Morgan* (1851), 9

Hare, 432; *Pickard v. Roberts* (1818), 3 Madd. 384.

(*u*) *Atcheson v. Atcheson* (1849), 11 Beav. 485.

(*x*) (1880), 14 Ch. D. 506; *Godfrey v. Bryan* (1880), 14 Ch. D. 516.

(*y*) *Atcheson v. Atcheson*, *ubi supra*.

(*z*) *Re Carr's Trusts* (1871), L. R., 12 Eq. 609. See however *Life Association of Scotland v. Siddal* (1861), 3 De G., F. & J. 271.

(*a*) *Taunton v. Morris* (1878), 8 Ch. D. 453.

Though there might be an equity to a settlement as against the husband or his assignees, a wife, whose ante-nuptial debts were still unsatisfied, was not entitled to a settlement of the property, until provision had been made from the property for the debts owing by her at the date of her marriage (*b*). Chap. I. s. 6.

This right of the wife to an equity to a settlement was principally of importance in those cases where the husband had assigned the fund to, or charged it in favour of, a particular assignee, or where it had vested in a general assignee under the husband's bankruptcy or insolvency. In those cases in which the husband only was interested, the allowance of the equity depended upon whether or not the wife was already provided with an adequate separate maintenance (*c*). It is clear that she was entitled, even out of property in which she took a life interest only, if her husband failed to maintain her, by deserting her (*d*), or by becoming bankrupt or insolvent (*e*). Against whom the equity arose.

In the case of the husband's bankruptcy or insolvency, the equity was enforced against his general assignee out of the wife's life interests, as well as absolute interests, in property, because, at the time when the title of such assignee was vested, the incapacity of the husband to maintain the wife had already raised the equity for the wife. A general assignee was in the same position as the husband himself, and as against him there was no distinction between a life interest and *corpus* (*f*), and on these grounds the settlement of a legacy to the wife has been held valid against the husband's creditors (*g*). As against general assignee.

As against a particular assignee for value, the wife's equity to a settlement out of property in which she took an absolute interest was fully established. In such a case, her right to the As against particular assignee.

(*b*) *Barnard v. Ford* (1869), L. R., 4 Ch. 247.

(*c*) *Aguilar v. Aguilar* (1820), 5 Madd. 414; *Spicer v. Spicer* (1856), 24 Beav. 365; *Giacometti v. Prodgers* (1873), L. R., 8 Ch. 338.

(*d*) *Gilchrist v. Cator* (1847), 1 De G. & Sm. 188.

(*e*) *Brown v. Clark* (1796), 3 Ves. 166; *Lumb v. Milnes* (1800), 5 Ves.

517; *Wright v. Morley* (1805), 11 Ves. 12; *Jacobs v. Amyatt* (1775), 1 Mad. 376, n.; *Squires v. Ashford* (1856), 23 Beav. 132.

(*f*) *Sturgis v. Champneys* (1839), 5 Myl. & Cr. 97; *Taunton v. Morris* (1878-9), 8 Ch. D. 453; 11 Ch. D. 779.

(*g*) *Montefiore v. Behrens* (1865), L. R., 1 Eq. 171.

Chap. I. s. 6. provision out of the property was not for herself alone, but for herself and her children, and was independent of the acts and conduct of her husband. Moreover, any one claiming under the husband could only take subject to the same equity as the husband. But there was a distinction in the case of a particular assignee for value of property in which the wife took a life interest only; and in such a case, where the husband had, previously to his desertion or inability to maintain his wife, assigned the property for value, the right of the wife did not arise; for the equity by which it was said that the purchaser was to be bound might not exist at the time of the purchase, and depending upon the conduct of the husband, might never come into existence (*h*).

In the case of a particular assignee for value, if the husband, at the time of the assignment of his wife's life interest, was *not* maintaining her, the equity for a settlement arose. If, on the other hand, the husband *was* maintaining her at the time of the assignment, but afterwards failed in the performance of that duty, the equity did not arise (*i*), because the assignee who became a purchaser *bond fide*, when the husband and wife were living together, ought not to suffer on account of any subsequent difference arising between the married parties.

The wife may assert her claim as plaintiff.

According to former opinions, it was only where the husband appeared as a plaintiff seeking aid from the Court that the equity came into action. But it was settled later, that the wife herself might assert her right to a settlement, by proceedings instituted against her husband for that sole purpose, through the instrumentality of her next friend (*k*). It was necessary to claim the settlement for herself and her children, and not for herself alone.

Amount settled.

There was no fixed rule as to the amount to be settled: the proportion in each case depended on all the circumstances;

(*h*) *Tidd v. Lister* (1852), 10 Hare, 140; *Taunton v. Morris* (1878-9), 8 Ch. D. 453; 11 Ch. D. 779.

(*i*) And this, too, though the wife's interest was at the time of

the assignment reversionary: *Life Association of Scotland v. Siddal* (1861), 13 De G., F. & J. 271, 276.

(*k*) *Elibank v. Montolieu* (1801), 5 Ves. 737.

and, in fixing it, any previous settlement which might have Chap. I. s. 6. been made, or any property of the wife's which might have been previously acquired by the husband, was taken into consideration. The amount, therefore, was discretionary in the Court (*l*).

Most frequently one-half of a fund (*m*), in some cases a larger proportion (*n*), was settled, and occasionally the *whole* fund, where special circumstances were present, such as insolvency on the part of the husband (*o*), inability to support (*p*) his wife, cruelty (*q*), desertion or adultery (*r*), or where the fund was small (*s*), or where the husband had already received part of the fund (*t*).

In cases of insolvency, and of no settlement on the wife, the

(*l*) *Green v. Otte* (1823), 1 Sim. & St. 250; *Napier v. Napier* (1841), 1 Dr. & War. 407; *Aubrey v. Brown* (1855), 4 W. R. 425; *Spirett v. Willows* (1866), L. R., 1 Ch. 520; *Re Suggitt's Trusts* (1868), L. R., 3 Ch. 215.

(*m*) *Jewson v. Moulson* (1742), 2 Atk. 417, 423; 1 Rop. 260, and cases there cited; *Spirett v. Willows* (1866), L. R., 1 Ch. 520.

(*n*) *Coster v. Coster* (1839), 9 Sim. 597. See, too, *Exp. Pugh* (1852), 1 Drew. 202; *Vaughan v. Buck* (1851), 1 Sim., N. S. 284; *Napier v. Napier* (1841), 1 Dru. & War. 407; *Exp. Thompson* (1835), 1 Deac. Bank. Cases, 90; *Re Suggitt's Trusts* (1868), L. R., 3 Ch. 215; *Conington v. Gilliat* (1876), 35 L. T. 736.

(*o*) *Gardner v. Marshall* (1845), 14 Sim. 575. See also *Re Merri-man's Trust* (1862), 10 W. R. 334; *Smith v. Smith* (1861), 3 Giff. 121; *Brett v. Greenwell* (1838), 3 Yo. & Coll. Ex. 230; *Jacobs v. Amyatt* (1775), 1 Mad. 376, n. It has always been usual to have regard to the amount of the wife's fortune appropriated by the husband. *Bond*

v. Simmons (1743), 3 Atk. 20; *Green v. Otte* (1823), 1 Sim. & St. 250; *Francis v. Brooking* (1854), 19 Beav. 347; *Scott v. Spashett* (1851), 3 Mac. & G. 599; and see *Taunton v. Morris* (1879), 11 Ch. D. 779 (C. A.).

(*p*) *Re Cutler* (1851), 14 Beav. 220; *Re Cordwell's Estate* (1875), L. R., 20 Eq. 644.

(*q*) *Oxenden v. Oxenden* (1705), 2 Vern. 493; *Williams v. Callow* (1717), *ibid.* 752.

(*r*) *Wright v. Morley* (1805), 11 Ves. 12; *Dunkley v. Dunkley* (1852), 2 De G., M. & G. 390; *Gilchrist v. Cator* (1847), 1 De G. & Sm. 188; *Gent v. Harris* (1853), 10 Hare, 383; *Layton v. Layton* (1853), 1 Sm. & G. 179; *Re Disney* (1856), 2 Jur., N. S. 206; *Koerber v. Sturgis* (1856), 22 Beav. 588; *Re Ford* (1863), 32 Beav. 621; see also *Boxall v. Boxall* (1884), 27 Ch. D. 220; *Reid v. Reid* (1886), 33 Ch. D. 226.

(*s*) *Re Kincaid's Trusts* (1853), 1 Drew. 326; *Re Hooper's Trusts* (1858), 6 W. R. 824.

(*t*) *Scott v. Spashett* (1851), *ubi sup.*; *Ward v. Yates* (1860), 1 Dr. & Sm. 80.

Chap. I. s. 6. whole fund, where the interest of the wife was absolute, has been settled, even against a purchaser for valuable consideration from the husband's assignees (*u*), or against the husband's assignees for value (*x*).

Waiver of
the equity by
consent in
Court.

The equity to a settlement might be waived by a married woman if of full age, but not if an infant (*y*), and only upon her consent being formally taken by the Court either upon her separate examination or under a special commission issuing from the Court (*z*); but if the consent had been already given upon examination before a competent tribunal, it would seem that she need not be examined again (*a*). The Court has, however, no jurisdiction to compel an infant to make a settlement of his or her property when unwilling to do so (*b*).

In the case of a ward of Court, whose husband committed a contempt of Court in marrying her, the Court refused to allow the wife to waive her equity (*c*).

The consent of the wife was not binding on her if made under a mistake (*d*), and it could be revoked at any time before the transfer of the fund was completed (*e*).

While the amount of the fund was unascertained, the Court would not take the wife's consent (*f*), except in cases where a known fund was liable to diminution, as for costs (*g*).

Where the sum belonging to the wife was under 200*l.*, it was

(*u*) *Francis v. Brooking* (1854), 19 Beav. 347; *Scott v. Spashett* (1851), 3 Mac. & G. 599.

(*x*) *Marshall v. Fowler* (1852), 16 Beav. 249; *Re Welchman* (1851), 1 Giff. 31; *Duncombe v. Greenacre* (1861), 29 Beav. 578.

(*y*) *Shipway v. Ball* (1881), 16 Ch. D. 376; *Stubbs v. Sargon* (1840), 2 Beav. 496; *Abraham v. Newcombe* (1842), 12 Sim. 566.

(*z*) See 1 Dan. Ch. Pract. 7th ed., pp. 151—155; Seton, Forms, 6th ed., vol. 2, p. 939 *et seq.*

(*a*) *Campbell v. French* (1797), 3 Ves. 321; *May v. Roper* (1831), 4 Sim. 360.

(*b*) *Leigh, In re, Leigh v. Leigh*

(1888), 40 Ch. D. 290; *Potter, In re*, 7 Eq. 484.

(*c*) *Stackpole v. Beaumont* (1797), 3 Ves. 89. See *Ball v. Coutts* (1812), 1 Ves. & Bea. 300.

(*d*) *Watson v. Marshall* (1853), 17 Beav. 363.

(*e*) *Penfold v. Mould* (1867), L. R., 4 Eq. 562.

(*f*) *Sperling v. Rochfort* (1803), 8 Ves. 163, 180; *Moss v. Dunlop* (1859), Johns. 490; *Anon.* (1859), 5 Jur., N. S. 1124.

(*g*) *Packer v. Packer* (1844), 1 Coll. 92; *Musgrove v. Flood* (1855), 1 Jur., N. S. 1086; *Roberts v. Collett* (1853), 1 Sm. & G. 138.

not usual for the Court to direct a settlement, although there was no hard and fast rule to that effect (*h*). Chap. I. s. 6.

The order for payment out, where the wife appeared to consent, could not originally be made at the hearing; but afterwards the order was made either at the hearing or on further consideration (*i*).

The evidence required to show that the fund was not affected by any settlement, was an affidavit by the husband and wife that there had been no settlement or agreement for a settlement; if, on the other hand, there was a settlement, it was necessary to produce it, an affidavit that the fund was not affected thereby being insufficient (*k*). This evidence was dispensed with where the fund was very small, as under 10*l.* (*l*). Evidence required.

The equity to a settlement has in some cases been treated, as depending upon the law of the domicile of the parties at the date of the marriage. There can be no doubt that if a settlement has been executed abroad by parties domiciled abroad, it must be construed in the English Courts according to the foreign law (*m*), irrespective of equities existing by the law of England. It seems doubtful, however, whether, in the absence of express contract, the foreign domicile of the parties, either at the date of the marriage, or at the time of the application, should be allowed to deprive the wife of this right, which is a rule of the English Court rather than a general principle of law (*n*). In *Schwabacher v. Becker* (*o*), Stuart, V.-C., thus expressed the principle on which these cases depend:— Where parties have foreign domicile.

“The wife’s equity to a settlement was an indulgence allowed by the

(*h*) *Merriman’s Trust, In re* (1862), 10 W. R. 334. As to the effect of sect. 7 of the Married Women’s Property Act, 1870, in the case of a woman married after that date, see *Voss, In re, King v. Voss* (1880), 13 Ch. D. 504.

(*i*) 13 & 14 Vict. c. 35, s. 28.

(*k*) *Rose v. Rolls* (1839), 1 Beav. 270; *Britten v. Britten* (1846), 9 Beav. 143.

(*l*) *Veal v. Veal* (1867), L. R., 4 Eq. 115.

(*m*) *Anstruther v. Adair* (1834), 2 My. & K. 513; *Marquis of Breadalbane v. Marquis of Chandos* (1836), 2 My. & Cr. 711, 738. See also *Duncan v. Campbell* (1842), 12 Sim. 616.

(*n*) In a recent case it has been held that as to chattels the rights of a wife under the French marriage law, as to community of goods, are not affected by change of domicile: *Nicols v. Curlier*, (1900) A. C. 21.

(*o*) (1854), 2 Sm. & G., App. iv.

Chap. I. s. 6. practice of this Court in derogation of the legal rights of the husband. The evidence of the legal rights of the husband, according to the country of the domicile, had nothing to do with the question."

It should, however, be stated that the Court has not always acted on this principle, but has occasionally regarded the rights of the parties as depending upon the law which happened to prevail in the foreign country (*p*).

Equity personal to the wife.

This equity was personal to the wife, and the children of the marriage had no independent equity of their own (*q*); but when a settlement of property was made by the direction of the Court, their interests were included. If, however, the wife died without having obtained a decree (*r*), or what was equivalent thereto (*s*), the children had no claim; for they could get nothing except through her instrumentality.

Interests of children always included.

A decree or order for a settlement always contemplated the interests of the children as well as those of the wife; and if, by any slip, it omitted express mention of the children, they were not allowed to suffer on that account (*t*).

But where the children had been omitted in the settlement directed by the Court, the omission, if it had been long acquiesced in, would not be supplied after the wife's death (*u*).

Form of settlement.

When a settlement was directed, the limitations were in the usual form for the benefit of the wife and children; and it appears to have been finally settled that a power of appointment by deed or will among the children of the marriage would be given to the wife, in priority to the limitations in favour of the

(*p*) *Sawer v. Shute* (1792), 1 Anst. 63; *Campbell v. French* (1797), 3 Ves. 321; *Dues v. Smith* (1822), Jac. 544; *M'Cormick v. Garnett* (1864), 5 De G., M. & G. 278; *Re Swift's Trusts*, W. N. 1872, p. 195.

(*q*) *Murray v. Lord Elibank* (1804), 10 Ves. 84; *Lloyd v. Williams* (1816), 1 Mad. 450; *Re Walker* (1835), L. & G. t. Sugd. 299; *Hodgens v. Hodgens* (1837), 4 Cl. & F. 323. But see *Johnson v. Johnson* (1820), 1 J. & W. 472.

(*r*) *De la Garde v. Lemprière* (1843), 6 Beav. 344; *Wallace v. Auldjo* (1863), 2 Dr. & Sm. 216; 1 De G., J. & S. 643; *Baker v. Bayldon* (1848), 8 Hare, 210, overruling *Steinmetz v. Halthin* (1826), 1 Glyn & J. 64.

(*s*) *Lloyd v. Mason* (1845), 5 Hare, 149.

(*t*) *Groves v. Clarke* (1836), 1 Keen, 132.

(*u*) *Johnson v. Johnson* (1820), 1 Jac. & W. 472, 479.

children (*x*); and in a comparatively recent case (*y*), a like power was inserted, the covenant by the husband contained in a post-nuptial deed to settle the property on trusts, not including such a power, being disregarded. Chap. I. s. 6.

If some of the children were otherwise provided for, the terms of the settlement might be varied in respect of them; but it did not, therefore, follow that they were to be excluded (*z*).

Though now of no practical value, the statement of the case of *Eedes v. Eedes* (*a*), and the observations upon it, contained in the earlier editions of this work are worthy of perusal, as they possess some historical interest, and show a state of opinion in former years greatly differing from that now commonly held as to the relations of husband and wife.

Debts incurred by a woman before marriage would disentitle her to a settlement out of property until the debts were satisfied (*b*). What would bar the wife's equity to a settlement.

A married woman might also by a fraudulent act preclude herself from her equity to a settlement (*c*).

A married woman who was entitled to a share of the proceeds of real estate upon directing it to be sold, and joining with her husband in levying a fine of her share, was held to be barred of her equity to a settlement (*d*).

It need scarcely be said that the wife's adultery barred her equity to a settlement (*e*), unless she were a ward of Court,

(*x*) *Spirett v. Willows* (1869), L. R., 4 Ch. 410, 411; *Watson v. Marshall* (1853), 17 Beav. 363; *Carter v. Taggart* (1852), 5 De G. & Sm. 49; 1 De G., M. & G. 286. See, contra, *Gent v. Harris* (1853), 10 Hare, 383; *Re Suggitt's Trusts* (1868), L. R., 3 Ch. 215; *Croxtan v. May* (1870), L. R., 9 Eq. 404; *Waleh v. Wason* (1872), L. R., 8 Ch. 482.

(*y*) *Oliver v. Oliver* (1878), 10 Ch. D. 765. See, however, *Re Gowan* (1881), 17 Ch. D. 778, where a joint power of appointment was given to the husband and wife.

(*z*) *Groves v. Clarke* (1836), 1 Keen, 132.

(*a*) (1841), 11 Sim. 569; conf. *Spicer v. Spicer* (1857), 24 Beav. 365; *Re Erskine's Trusts* (1855), 1 K. & J. 302.

(*b*) *Barnard v. Ford* (1869), L. R., 4 Ch. 247; *Bonner v. Bonner* (1853), 17 Beav. 86.

(*c*) *Re Lush's Trusts* (1869), L. R., 4 Ch. 591.

(*d*) *May v. Roper* (1831), 4 Sim. 360. See now 3 & 4 Will. 4, c. 74, s. 77.

(*e*) *Carr v. Eastbrooke* (1798), 4 Ves. 146; *Ball v. Montgomery*

Chap. I. s. 6. married without its consent, in which case a settlement would be decreed, because the husband (whatever might be the measure of his wife's misconduct) appeared himself before the Court in the attitude of a delinquent (*f*). But the wife's equity has been allowed where both she and her husband were living in adultery (*g*).

An adequate separate provision for the wife secured by settlement would deprive her of this equity, even though the husband was living apart from her (*h*). To bar the wife's equity, the settlement must have been adequate, or, if inadequate, there must have been an express stipulation before marriage, the meaning of the deed plain, and the intention free from doubt (*i*).

It has been decided that the husband might by settlement become the purchaser of property of the wife, which otherwise, if not reduced into possession, would not have legally fallen under his marital right (*k*).

Thus, the wife's choses in action, not reduced into possession, might by settlement have been made the husband's absolutely, and in such a case the wife's equity to a settlement and also her right by survivorship would be barred. But the mere fact that there was a settlement by no means proved that the husband became the purchaser of the wife's choses in action, or of all other property which might afterwards come to the wife (*l*). It

(1793), 2 Ves. 191; *Watkins v. Watkins* (1740), 2 Atk. 96; *Duncan v. Campbell* (1842), 12 Sim. 616. But her equity has been allowed under peculiar circumstances: *Re Lewin's Trusts* (1855), 20 Beav. 378.

(*f*) *Ball v. Coutts* (1812), 1 Ves. & Bea. 292, 300.

(*g*) *Greedy v. Lavender* (1850), 13 Beav. 62.

(*h*) *Aguilar v. Aguilar* (1820), 5 Madd. 414; *Spicer v. Spicer* (1856), 24 Beav. 365; *In re Erskine's Trusts* (1856), 1 K. & J. 302; *Giacometti v. Producers* (1873), L. R., 8 Ch. 338.

(*i*) *Salwey v. Salwey* (1770), Amb. 692; *Garforth v. Bradley* (1755), 2 Ves. sen. 675; *Druce v. Dennison*

(1801), 6 Ves. 385, 395; *Fenner v. Taylor* (1831), 2 R. & My. 190; *Blois v. Lady Hereford* (1705), 2 Vern. 501; *March v. Head* (1749), 3 Atk. 720.

(*k*) *Lanoy v. Duchess of Athol* (1742), 2 Atk. 444, 448; *Sykes v. Meynal* (1763), 1 Dick. 368.

(*l*) *Heaton v. Hessel* (1720), 4 Vin. Abr. 40, n.; *Mitford v. Mitford* (1803), 9 Ves. 87; *Carr v. Taylor* (1805), 10 Ves. 574; and see *Beresford v. Hobson* (1816), 1 Madd. 362; *Burdon v. Dean* (1795), 2 Ves. 607; *Tomkyns v. Ladbroke* (1754), 2 Ves. sen. 591; *Lady Elibank v. Montolieu* (1801), 5 Ves. 737; *Freeman v. Fairlie* (1847), 11 Jur. 447; *Barrow*

was necessary to show that this was part of the contract between the parties, either expressed to be part of the consideration of the settlement, or to be presumed from a fair consideration of its contents. Chap. I. s. 6.

In former editions, a chapter entitled "Wife's Maintenance out of her Equitable Property" was devoted to the consideration of the circumstances in which an annuity of the wife, or her life interest in any property, would, notwithstanding that it was unprotected by any settlement, be applied for her maintenance. The doctrine of "equity to maintenance" appears to have been invented to meet the cases of annuities or life interests in property, to which it was at one time doubted whether the right of the equity to a settlement attached. But as it has been now settled, by *Taunton v. Morris (m)*, that the equity to a settlement does attach to such interests, and as the application of the doctrine was governed by precisely the same considerations as those upon which the equity to a settlement depended, and is now of little or no practical value, it appears needless to devote a separate chapter to the subject. Whatever may be instructive or essential has been incorporated in the previous pages. It is only necessary to add that these orders for maintenance were in their nature temporary, being made with a view to the fact that the necessity for them might cease. Wife's equity to maintenance.

Maintenance out of the husband's property might also by virtue of a special contract have been payable to the wife (n).

The Court would not permit this equity to be defeated by any trick or contrivance of the husband. If, therefore, as in *Colmer v. Colmer (o)*, he, with a view of deserting his wife, made a fraudulent conveyance of his own and her property to trustees, the Court would follow her property and order her an allowance out of it. Fraud upon this equity.

Persons who made necessary advances of money to the wife, when she was in circumstances which gave her a right to separate maintenance, were entitled to repayment out of her equitable property (p). Advances to wife when she is entitled to separate maintenance.

v. *Barrow* (1854), 18 Beav. 529;
5 De G., M. & G. 782.

(m) (1878-9), 8 Ch. D. 453; 11
Ch. D. 779.

(n) *Head v. Head* (1745), 3 Atk. 295.

(o) (1728), Mos. 113.

(p) *Guy v. Pearkes* (1811), 18 Ves.
196. See *Re Ford* (1863), 32 Beav. 621.

SECTION VII.

ALIENATION OF THE WIFE'S REAL ESTATE.

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Married woman's power over separate estate.

"It cannot be now disputed that when a woman is the owner of real estate to her separate use, she is to all intents and purposes in the position of a *feme sole*, so as to be able to dispose of that estate by will or deed" (*q*). This concise summary of the law is open to misconception in two particulars. Firstly, the separate use may be limited to her life interest, and she may take a power of appointing the corpus by *will* only, in which case an attempted alienation by her of the fee simple *inter vivos* would be inoperative (*r*). Secondly, the separate use being the "creature of equity" does not enable the married woman to deal with the legal estate, whether it is expressly vested in trustees, or the husband is converted into a constructive trustee. In the one case the trustees must concur; in the other, the same procedure must be adopted as in the case of property not settled to the separate use of the wife. Otherwise, although the equitable

(*q*) Per Lord Hatherley, L. C., in *Pride v. Bubb* (1871), L. R., 7 Ch. 69.

(*r*) If however the power were to appoint by deed or will the limitations would be regarded as conferring an absolute separate pro-

perty: *The London Chartered Bank v. Lemprière* (1873), L. R., 4 P. C. 572, 595. See *In re Harvey's Estate* (1879), 13 Ch. D. 216, and the remarks on that case in *Pike v. Fitzgibbon* (1881), 17 Ch. D. 466.

fee will be bound, the legal estate will remain outstanding (s). Chap. I. s. 7. Subject, however, to these two exceptions, a married woman, having real estate settled to her separate use, can dispose of that estate as if she were a *feme sole*. It is, therefore, unnecessary to consider the case of property settled to the separate use of a married woman; and we may also dismiss with a word all "separate property" held by married women under the provisions of the Married Women's Property Acts, 1870 and 1882 (t). This, indeed, is property settled to the separate use of the married woman, and something more; for in this case the intervention of a trustee is not necessary, and her power of disposition extends to the legal as well as the equitable interest (u). After the 31st December, 1882, a devise or conveyance to a married woman and her heirs vests the legal estate in her as if she were a *feme sole*, and she can dispose thereof by her will or by deed without any acknowledgment.

This will, of course, be eventually the universal condition of married women's property; but for a few years the old law will in some cases prevail, and it is therefore necessary still to treat, in a summary manner, the subject apart from the changes introduced by recent legislation.

Considering, then, the case of real estate vested in a married woman without any trust for her separate use, her husband and she are said to be jointly seised in her right; and, as the estate of the husband is limited to the coverture, or to his own life if he is entitled to curtesy, and, as the wife is under disability, no effectual alienation of the estate is possible except under the provisions of an Act of Parliament. The husband being entitled to an estate of freehold during the coverture can, of course, sell

Position of married woman under old law.

(s) See the remarks in *Dav. Conv.* vol. ii. pt. i. p. 196.

(t) The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 8, declares that where real estate shall descend upon any woman married after the 9th August, 1870, as heiress or co-heiress of an intestate, the rents and profits shall belong to her for her separate use. This

enactment does not affect the devolution of the legal estate, and it appears doubtful whether the separate use is confined to the life estate, or comprises the fee simple. See *In re Voss* (1880), 13 Ch. D. 504.

(u) The question how far the Act of 1882 applies to trust estates will be discussed in a subsequent chapter.

Chap. I. s. 7. or mortgage his interest, but such alienation will not affect the inheritance unless the requirements of the Act for the Abolition of Fines and Recoveries are duly observed.

The general enabling clause of this Act is as follows:—

Fines and
Recoveries
Act, s. 77.

“After the 31st day of December, 1833, it shall be lawful for every married woman in every case, except that of being tenant in tail, for which provision is already made by this Act(x), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this Act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this Act, have been effected by her in concurrence with her husband by surrender into the hands of the lord of the manor, of which the lands may be parcel” (y).

The scope of this section was enlarged by the Act to amend the Law of Real Property (z), by which contingent and future interests in land as well as rights of entry were made assignable by deed, with a proviso that dispositions thereof by married women should be made in conformity with the Fines and Recoveries Act (a). And by the same statute (b) power was given to married women to disclaim estates or interests in land, with a like qualification as to observing the formalities of the above-mentioned Act.

(x) By the 40th section of the Fines and Recoveries Act, it is provided that “if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same, and any deed which may be executed by her for effecting the disposition shall be acknowledged

by her as hereinafter directed.”

(y) Sect. 90 enacts that married women shall be separately examined on the surrender of equitable estates in copyholds, in the same manner as if such estates were legal.

(z) 8 & 9 Vict. c. 106.

(a) Sect. 6.

(b) Sect. 7.

Every deed to be executed by a married woman, for any of the purposes of the Act (except such as may be executed by her as protector, for the sole purpose of giving her consent to the disposition of a tenant in tail) is required to be acknowledged (c) by her before a judge of the High Court or of a county court, or before a perpetual or special commissioner (d); and before receiving the acknowledgment of any married woman, the judge or commissioner is to examine her apart from her husband touching her knowledge of such deed, and to ascertain whether she freely and voluntarily consents thereto; and unless she do so, he is not to permit her to acknowledge the same; and in such case such deed, so far as relates to her execution thereof, shall be void (e).

Chap. 1. s. 7.

Acknowledgments of married women.

Examination apart from her husband.

The appointment of perpetual commissioners for each county was authorized by sect. 81; but the object of so appointing them was that they might be at hand to take acknowledgments, not that their powers were to be geographically limited; and it was accordingly decided, under sect. 82, that the commissioners need not be appointed for the county in which the acknowledgment is taken (f). It has also been decided that they have a lien for their fees on the deed and other documents (g).

Where by reason of residence beyond seas, or ill health, or any other sufficient cause, any married woman is prevented from making the acknowledgment in the ordinary manner, a special commission may be issued to take the acknowledgment (h).

(c) There is no limit as to time when the acknowledgment is to be made. *Re The London Dock Act* (1855), 20 Beav. 490; on appeal, 7 De G., M. & G. 627, where it was held that a disentailing deed by a *feme covert* was effectual although not acknowledged until after enrolment.

(d) Sect. 79 as amended by 19 & 20 Vict. c. 108, s. 73, and the Conveyancing Act, 1882 (45 & 46 Vict. c. 39).

(e) Sect. 80. As to character of

the examination, see *Tennent v. Welch* (1888), 37 Ch. D. 622.

(f) *Blackmur v. Blackmur* (1876), 3 Ch. D. 633, overruling *Webster v. Carline* (1842), 4 Man. & Gr. 27. See however *Re Jane Read*, W. N. 1877, 116, where the Court followed the latter case.

(g) *Exp. Grove* (1836), 3 Bing. N. C. 304.

(h) Sect. 83. The Commission may issue to a single commissioner (Conv. Act, 1882, s. 7 (1)), who ought to be a disinterested person.

Chap. I. s. 7.

Interests
within the
Act.

The power of disposition conferred upon married women by the Fines and Recoveries Act has been held to extend to a reversionary share of the proceeds of sale of real estate (*i*) and to a mortgage debt, even where it is secured only by a deposit of title deeds (*k*); but not where the mortgage debt belongs to trustees as part of a residue, to a share of which the married woman is entitled (*l*). In a case where trustees had, in breach of trust, invested a fund of personalty in the purchase of land, it was decided that married women entitled in reversion could dispose of the land by deed acknowledged, although if it had been personalty they could not have done so (*m*).

The husband is not prevented by bankruptcy from concurring in the deed in the manner required by the 77th section, the disposition being in effect that of the wife alone (*n*); and the husband's concurrence must be evidenced by his actually executing the deed (*o*).

Married
woman's
power to
contract.

A married woman can by deed acknowledged contract so as to bind her real estate (*p*), and she may without a deed acknowledged become bound by election (*q*); but an agreement for the sale of her real estate which is not her separate property, or settled to her separate use, or subject to her general power of appointment, cannot be enforced (*r*); and even when entered

Exp. Menhennet (1869), L. R., 5 C. P. 16; and see the Conv. Act, 1882, s. 7 (3), and the rules made in pursuance thereof.

(*i*) *Briggs v. Chamberlain* (1853), 11 Hare, 69; *Tuer v. Turner* (1855), 20 Beav. 560; *Re Jakeman's Trusts* (1883), 23 Ch. D. 344.

(*k*) *Williams v. Cooke* (1863), 4 Giff. 343.

(*l*) *Re Newton's Trusts* (1883), 23 Ch. D. 181.

(*m*) *Re Durrant and Stoner* (1881), 18 Ch. D. 106.

(*n*) *Re Jakeman's Trusts* (1883), 23 Ch. D. 344; and see *Re Batchelor* (1873), L. R., 16 Eq. 481; *Cooper v. Macdonald* (1878), 7 Ch. D. 288.

(*o*) *Re Green and The Metropolitan Board of Works*, W. N. 1880,

p. 186.

(*p*) *Crofts v. Middleton* (1856), 8 De G., M. & G. 192. As to the effect of a fraudulent concealment of marriage by a woman who, during coverture, executed, for valuable consideration, an unacknowledged deed, affecting lands, as a *feme sole*, see *Gausen's and Jones' Estate* (1888), 21 L. R., Ir. 421.

(*q*) *Barrow v. Barrow* (1858), 4 K. & J. 409; and see *Griggs v. Gibson* (1866), L. R., 1 Eq. 685; *Smith v. Lucas* (1881), 18 Ch. D. 531; *Wilder v. Pigott* (1882), 22 Ch. D. 263.

(*r*) *Emery v. Wase* (1801), 5 Ves. 846; *Nicholl v. Jones* (1867), L. R., 3 Eq. 696.

into for valuable consideration, and acted on by the other party, Chap. I. s. 7. it does not acquire validity by reason of "part performance" (s). When a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey, it was held that the purchaser could not compel the husband to convey his interest and accept an abated price (t).

As the wife could not (except where it was her separate property) alienate her real estate without her husband's concurrence, so neither could she mortgage or charge it. And as the act of alienation must be free and voluntary on her part, so likewise must the act of charging be; the provisions for taking the acknowledgments of married women, already referred to, being applicable in every case where the ultimate fee, or inheritance of the wife's estate, was affected, whether by total or partial disposition.

Upon mortgages executed of the wife's estate by husband and wife for securing payment of his debts, difficult questions occasionally arose. In general, it was construed that the equity of redemption remained in the wife and her heirs. But it sometimes happened that the equity of redemption was transferred to the husband and his heirs. The consideration of this subject will be more conveniently dealt with, when we come to examine the rights which arise to the widow on the dissolution of the marriage by the death of the husband; on which occasion we shall also direct attention to another topic of a cognate nature, namely, the equity of the wife to have her estate exonerated, out of her husband's assets, from incumbrances imposed on it during the coverture in respect of his debts.

The concurrence of the husband is, as we have seen, required to enable the wife to make an effectual disposition of her estate; but by the 91st section this concurrence may be dispensed with in certain cases therein specified.

Therefore, if a husband labour under incapacity (u), if his

(s) *Williams v. Walker* (1882), 31 V. & P. 208, 14th ed.; Dart, V. & P. 1082, 7th ed.

(t) *Castle v. Wilkinson* (1870), L. R., 5 Ch. 534; and see *Sugden*, (u) As from lunacy, *Re Turner* (1846), 3 C. B. 166; infancy, *Re Haigh* (1858), 2 C. B., N. S. 198.

Charges upon the wife's fee simple.

Wife's equity of redemption.

Concurrence of husband,

Chap. I. s. 7.
when dispensed with.

residence be unknown, if he be in prison, or if he be living apart from his wife (*y*), the High Court may dispense with his concurrence in any deed to be executed by his wife, which, but for this enactment, would, without his concurrence, have been invalid. The Court, however, unless the husband be beyond reach, will require evidence that a proper application has been made to him for his concurrence, and that it has proved unsuccessful (*z*). The cause, too, of his non-concurrence must appear to be such as to justify the Court in dispensing with his concurrence (*a*).

Where the husband and wife had for many years lived separate, and the husband had been found lunatic, an order was made, on the affidavit of the wife setting forth the facts of the case, that she might be at liberty to dispose, without the concurrence of her husband, of certain lands to which she was entitled as tenant in tail in possession, and tenant in fee simple in possession (*b*).

An affidavit by the wife herself, setting forth satisfactory reasons for non-concurrence by her husband, will in no case be dispensed with (*c*).

Evidence
required.

In order to obtain an order on a presumption of death arising from his absence, the wife must make an affidavit negating any communication from him during such absence (*d*).

When the application is founded on the husband living apart

(*y*) As to the form of rule to dispense with the husband's concurrence when he is separated from his wife by sentence of divorce, see *Exp. Duffill* (1843), 5 Man. & Gr. 378.

(*z*) *Re Mirfin* (1842), 4 Man. & Gr. 635.

(*a*) *Re M. Williams* (1840), 1 Man. & Gr. 881. Thus the Court will not dispense with the husband's concurrence upon an affidavit merely stating that the wife had left her husband in consequence of his violence, and was living apart from him. *In re Price* (1862), 13 C. B., N. S. 286.

(*b*) *Exp. Thomas* (1834), 4 Moore & Sc. 331.

(*c*) *Re Williams* (1840), 2 Scott, N. C. 120; *Shuttleworth, Exp.* (1834), 4 Moo. & Sc. 332, n.; *Thomas, Exp.* (1834), 4 Moo. & Sc. 331; *Woodcock, In re* (1845), 1 C. B. 437; *Shirley, Exp.* (1839), 5 Bing. N. C. 226; *Williams, In re* (1840), 1 Man. & G. 881.

(*d*) *Re A. Horsfall* (1841), 3 Man. & Gr. 132. See also *Exp. Thomas* (1834), 4 Moo. & S. 331; *Exp. Yarnall* (1855), 17 C. B. 189; *Re Smith* (1847), 16 L. J., C. P. 168; *Re Squires* (1852), 25 L. J., C. P. 55.

from his wife, it should in general be proved that he does not contribute to her support, but if he refuses to concur merely for the purpose of extracting money, the order will be made independently of that consideration (*e*). The order may be made not only where the wife is beneficially interested, but also where she is a trustee (*f*). Evidence is required in both cases of a previous application to the husband to concur and of his refusal to do so (*g*). The section also applies to the legal estate in property devised to the separate use of a married woman without the intervention of a trustee (*f*), and to a conveyance for the purpose of releasing dower (*h*).

The order will, as a general rule, be made only to give effect to a particular contract (*i*), but where the applicant was poor, the property small, and a sale by auction desirable, a prospective order was made (*k*).

An order obtained by fraud or suppression of facts will be set aside (*l*); but a clear case is required, and especially where the rights of third parties have intervened (*m*). Where an order has been made dispensing with the husband's concurrence, the deed of the wife need not be acknowledged by her (*n*).

By the Settled Land Act, 1882 (*o*), large powers of dealing with real estate are conferred upon tenants for life and other limited owners (*p*). Such persons, for example, can sell the settled land or any part thereof (*q*), and grant building, mining and agricultural leases upon the terms prescribed by the statute (*r*).

(*e*) *Re Woodcock* (1845), 1 C. B. 437; *Exp. Robinson* (1869), L. R., 4 C. P. 205; *Re Caine* (1882), 10 Q. B. D. 284. See *In re Alice Rogers* (1865), L. R., 1 C. P. 47.

(*f*) *Re Haigh* (1857), 2 C. B., N. S. 198; *Re Caine* (1882), *supra*.

(*g*) *Re Mirfin* (1842), 4 Man. & Gr. 635.

(*h*) *Re Woodcock, supra*; *Exp. Duffill* (1843), 5 Man. & Gr. 378.

(*i*) *Re Graham* (1863), 19 C. B., N. S. 370; and see *Re Cloud* (1864), 15 C. B., N. S. 833.

(*k*) *Re Mary Hart*, W. N. 1882, 36.

(*l*) *Re Alice Cockerell* (1878), 4 C. P. D. 39.

(*m*) *Re Alice Rogers* (1865), L. R., 1 C. P. 47.

(*n*) *Goodchild v. Dougal* (1876), 3 Ch. D. 650.

(*o*) 45 & 46 Vict. c. 38.

(*p*) As to the persons who "have the powers of a tenant for life" under the Act, see sect. 58.

(*q*) Sect. 3.

(*r*) Sects. 6—9.

Order, when set aside.

Settled Land Act, 1882.

Chap. I. s. 7.

It is not within the scope of the present work to enter fully into the consideration of this Act, but it is necessary to consider its provisions so far as they relate exclusively to married women ; and it should be remembered that it received the royal assent a few days before the Married Women's Property Act, 1882, although both measures came into operation on the same day.

The effect of the 61st section of the Act seems to be that where a married woman is a limited owner within the meaning of the Act, and is entitled "*for her separate use, or for her separate property,*" she can exercise the statutory powers as if she were a *feme sole* ; but if she is not entitled for her separate use or for her separate property, her husband must join with her in the exercise of the powers.

The concurrence of the husband can only be required when the marriage took place before the 1st January, 1883, and the married woman's title to the property has accrued before that date. In all other cases she can act alone. It is to be observed that under this Act when property is vested in trustees upon trust to pay the rents and profits to a married woman during her life for her separate use, she can, without the concurrence of the trustees, convey the legal estates to the purchaser (*s*). A restraint on anticipation does not prevent the exercise of the powers, but it will attach to the purchase-money, and to any investment thereof (*t*).

Agricultural
Holdings
Act, 1883.

The Agricultural Holdings Act, 1883 (*u*), which contains various provisions as to the consent of landlords to improvements by tenants, and as to agreements for compensation, contains the following enactment with reference to women married before the commencement of the Married Women's Property Act, 1882 (*x*).

"A woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act be in respect of land as if she was unmarried."

(*s*) See sect. 20.

(*t*) Sects. 22 (5), 24.

(*u*) 46 & 47 Vict. c. 61.

(*x*) Sect. 26.

“Where any other woman married before the commencement of the Chap. I. s. 7. Married Women’s Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband’s concurrence shall be requisite, and she shall be examined apart from him by the County Court, or by the judge of the County Court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.”

CHAPTER II.

LIABILITIES ARISING FROM THE MARRIAGE.

SECTION I.

LIABILITY OF THE HUSBAND AND THE WIFE FOR THE ANTE-NUPTIAL OBLIGATIONS OF THE WIFE.

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THE law on this subject has, for the present, been rendered somewhat complicated by the successive changes introduced by the various Acts; and, as the liability of the husband is determined by the date of the marriage (none of the Acts being retrospective in this particular), it becomes necessary to consider briefly the various phases through which the law has passed. The liability of the husband in respect of his wife's ante-nuptial obligations must be considered with reference not only to her debts, but also to her contracts and torts.

Under the old law, *i.e.*, in the case of marriages contracted before the 9th August, 1870, the husband, on his marriage, became liable for his wife's debts incurred before marriage of whatever amount, and whether he had any fortune with her or not. In the words of Blackstone "he adopted his wife and her circumstances together" (a).

Chap. II. s. 1.
Liability of husband apart from statute.

This liability, however, terminated with the coverture, and after the death of the wife no action could be brought against the husband; unless, indeed, he was her personal representative, in which capacity he would have been liable so far as he had assets (b).

The husband was likewise liable in respect of the contracts of his wife entered into, and torts and breaches of trust committed by her before the marriage.

In *Palmer v. Wakefield* (c), where a woman when *sole* had committed a breach of trust, and the question was whether her after-taken husband should make good the loss sustained by the trust estate, Lord Langdale said: "In this situation she married Mr. Wakefield, and it was by the marriage and by his assuming the liabilities to which *she* was subject, that he also, as I think, became liable to pay the money."

The effect of marriage was to charge the husband with the wife's prior debts, but it did not act as an absolute release to the wife; for, in the case of the bankruptcy of the husband, although his bankruptcy and discharge released both husband and wife from their personal liability at law, the separate property of the wife remained liable in equity to satisfy these debts: and in the case of the death of the husband the liability of the wife again revived (d).

Wife not absolutely released from liability.

(a) Bk. 1, c. 15, p. 443.

(b) *Thomond v. Suffolk* (1718), 1 P. Wms. 461; *Heard v. Stamford* (1735), 3 P. Wms. 409; *Bell v. Stocker* (1882), 10 Q. B. D. 129.

(c) (1840), 3 Beav. 227; and see *Wainford v. Heyl* (1875), L. R., 20 Eq. 321.

(d) *Chubb v. Stretch* (1870), L. R., 9 Eq. 555; *Mitchison v. Hewson*

(1797), 7 T. R. 348; *Woodman v. Chapman* (1808), 1 Camp. 189. The husband's liability, however, as it originated in the marriage, ceased with it; so that if the obligation were not enforced in the lifetime of the wife, the surviving husband could not be charged either at law or in equity, should he have had ever so large a fortune with her.

Chap. II. s. 1. It was necessary, in order to charge the husband with the wife's prior debt, to prove the marriage. But strict evidence was not required where the fact of marriage was not in dispute. Thus, in an action against husband and wife, on the promissory note of the wife made *dum sola*, a witness stated that he knew her formerly, and had heard that she had afterwards married E. F. This was held sufficient *prima facie* evidence of marriage (e).

Evidence required to charge the husband.

Act of 1870. In cases to which the Act of 1870 applies, *i.e.*, where the marriage took place between the 9th August, 1870, and the 29th July, 1874, both days inclusive, the husband's liability for his wife's ante-nuptial debts has been abolished, and the remedy of the creditor is confined to the separate property of the wife.

The husband released from liability.

The wife rendered liable. By the 12th section it is enacted that:—

“A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried” (f).

Meaning of “liable to be sued for.”

It was held, however, in *Ex parte Jones* (g), that the words in this section “liable to be sued” mean no more than a liability to be sued as in equity for the purpose of attaching her separate estate.

Even though restrained from anticipation.

It was also held in a series of decisions that the words “any property belonging to her for her separate use” were wide enough to include any separate property, whether subject to a restraint on anticipation or not (h). Thus it was decided in *Sanger v. Sanger* (i) that, notwithstanding a restraint on anticipation annexed to an annuity, a charging order obtained by

This, however, applied only to property falling under his marital right, and not to his wife's choses in action, which he took at her death as her administrator.

(e) *Evans v. Morgan* (1832), 2 Crompt. & Jer. 453; and see *Westmacott v. Westmacott*, (1899) P. 183.

(f) 33 & 34 Vict. c. 93, s. 12.

(g) (1879), 12 Ch. D. 490.

(h) *Axford v. Reid* (1889), 22 Q. B. D. 548, C. A.

(i) (1870), L. R., 11 Eq. 470; but see *Robinson v. Wheelwright* (1856), 6 De G., M. & G. 535; *Stanley v. Stanley* (1878), 7 Ch. D. 589; and the Conveyancing Act, 1881, s. 39.

creditors under this section constituted a valid incumbrance on the fund. Since the passing of the Married Women's Property Act, 1882, a statutory distinction has, however, been drawn between cases in which the restraint is imposed by a stranger and those in which the wife, on her marriage, attaches a restraint on anticipation to her own property, the effect of which might be to withdraw from her creditors the only fund available for the satisfaction of their claims (*k*). (For a further discussion on this subject, see *post*, p. 373.) Chap. II s. 1.

Under this section a married woman is liable to be sued for such debts as if she had continued unmarried, and therefore the husband need not be joined as defendant with his wife in an action brought for such debts, and execution may issue against her as if she were an unmarried woman (*l*).

It was obviously unjust to the creditors of the wife before marriage that the husband, however large a fortune he might have acquired with his wife, should escape from all liability in respect of her ante-nuptial engagements. To remedy this state of things the Act of 1874 was passed. This Act left the liability of the separate property of the wife for her ante-nuptial debts unaffected (*m*), and it repealed, as to marriages after the 29th July, 1874, so much of the earlier Act as enacted that a husband should not be liable for the debts of his wife contracted before marriage, and provided that a husband and wife married after the passing of the Act might be jointly sued for any such debt (*n*). Act of 1874.
Liability of
the husband
partially
restored.

In any such action the husband was liable to the extent only of certain assets specified in the Act.

The Act of 1870 had released the husband from all present The husband
liable for the

(*k*) *Birmingham Excelsior Money Society v. Lane*, (1904) 1 K. B. 35, C. A.; and see *London and Provincial Bank v. Bogle* (1878), 7 Ch. D. 773; *Chubb v. Stretch* (1870), L. R., 9 Eq. 555; *Hedgley, In re* (1886), 34 Ch. D. 379; and the Married Women's Property Act, 1882, ss. 13 and 19. For decision since this Act, see *Kirk v. Murphy*, (1892) 30

L. R., Ir. 508.

(*l*) *Williams v. Mercier* (1882), 9 Q. B. D. 337. As to the personal liability of a married woman at common law, see *Robinson v. Lynes*, (1894) 2 Q. B. 577.

(*m*) 37 & 38 Vict. c. 50. This Act came into operation on the 30th July, 1874.

(*n*) *Ibid.* sect. 1.

Chap. II. s. 1.

wife's torts
and breaches
of contract to
extent of
assets re-
ceived.

liability for his wife's ante-nuptial debts, but left him liable, to the full extent to which he was liable by the common law, for the torts and breaches of contract of the wife committed before marriage (o). This liability of the husband was again altered by the Act of 1874, and he was by that statute rendered liable for the ante-nuptial torts, breaches of contract and debts of the wife to the extent only of the assets of the wife therein mentioned; for it was enacted that:—

“The husband shall in . . . any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified” (p).

It was not the duty of the plaintiff to allege that the husband had received assets, but it was for the husband to deny that he had (q).

Property
constituting
assets.

These assets consisted of property of the wife acquired by the husband, either *jure mariti*, or by ante-nuptial gift, including personal estate in possession, choses in action, chattels real, and the rents and profits of real estate; and also any property, real or personal, which the wife, with the consent of her intended husband, had transferred to any person with the view of defeating or delaying her existing creditors.

The same section provides that any payment made by the husband, and any judgment recovered against him under the Act, are to be taken into account in estimating his liability in any subsequent action (r).

It was also provided by this Act, that if the husband was not liable in respect of any such assets, he should have judgment for his costs of defence, whatever the result of the action might be against the wife (s), and that if he was liable the judgment should be a joint judgment against husband and wife to the extent of the husband's liability, and a separate judgment

(o) Sect. 2.

Matthews v. Whittle (1880), 13 Ch. D. 811.

(p) See, however, *Conlon v. Moore* (1875), Ir. R., 9 C. L. 190.

(r) *Fear v. Castle* (1881), 8 Q. B. D. 380.

(q) 37 & 38 Vict. c. 50, s. 5;

(s) 37 & 38 Vict. c. 50, s. 3.

against the wife for the residue of the debt or damages (t). Chap. II. s. I.
 In the case of an action against the husband and wife jointly, where the husband is found not liable in respect of any such assets as are mentioned in the Act, the plaintiff will be allowed to add the costs of the husband's defence to his own, and recover both against the wife. Thus, in *London and Provincial Bank v. Bogle* (u), the husband, in an action by the bank against himself and his wife for debts contracted previously to marriage, pleaded that he had not, and never had, at the time or since his marriage, any assets in respect of which he was liable for such debts of his wife. Judgment was entered for him with costs, but against his wife; and the bank were held entitled to add his costs to their original debt, and recover the whole against the separate estate of the wife.

London & Provincial Bank v. Bogle.

Under these provisions it has also been held that an Englishman married in England to a woman who had contracted debts in a foreign country where she resided prior to the marriage, is liable in England only to the extent of assets derived from his wife (x).

But the liability of the husband under this statute (y) subsisted only during the coverture, for the Act (z) rendered it necessary that the husband and wife be sued jointly, and gave no power to sue the husband alone. Consequently the husband's liability ceased upon his wife's death, as no action would lie against him alone.

Although the Act of 1874 is repealed by that of 1882, the liabilities of a husband married between the 29th July, 1874, and the 1st January, 1883, are not affected by such repeal (a). The principal provisions, indeed, of the earlier Act are re-enacted, and a husband is still rendered liable for his wife's ante-nuptial debts, contracts and wrongs in the same manner, though not to the same extent, as under the Act of 1874.

The property of the husband which can be made available to meet this liability is less than formerly, for the greater part of

Extent of liability of the husband.

(t) 37 & 38 Vict. c. 50, s. 4.

(u) (1878), 7 Ch. D. 773.

(x) *De Greuchy v. Wills and Wife* (1879), 4 C. P. D. 362.

(y) Married Women's Property Act, 1874 (37 & 38 Vict. c. 50).

(z) *Ibid.* sect. 1.

(a) 45 & 46 Vict. c. 75, s. 14.

Chap. II. s. 1. the assets which he formerly acquired by the marriage has now ceased to devolve upon him, and the only property which he can so acquire or become entitled to during the marriage will henceforward be whatever he may take by gift or settlement. This will, therefore, in the case of all marriages subsequent to January 1st, 1883, be the extent of his liability. Under this statute the husband may be sued alone, and consequently the death of his wife will not prevent an action being brought against him alone in respect of her ante-nuptial liabilities, and if he has received assets from her he will be liable to the extent of those assets (b).

The wife
liable.

As regards a woman married on or after the 1st January, 1883, she is, by the 13th section of the Act of 1882, liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into, or wrongs committed by her before marriage, including any sums for which she may be liable as a contributory under the Joint Stock Companies Acts; and she may be sued for any such debt, and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property, and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts or wrongs, and for all damages or costs recovered in respect thereof (c).

And this liability extends to all ante-nuptial property belonging to a wife which she may have had settled upon herself without power of anticipation. The second part of sect. 19 of the Act providing that:—

“No restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.”

(b) *Secus* under the Act of 1874; 129.
Bell v. Stocker (1882), 10 Q. B. D. (c) Sect. 13.

Where, however, the settlement without power of anticipation, Chap. II. s. 1. whether it be ante or post-nuptial, is made by any person other than the woman herself, it is not liable to attachment in respect of either an ante-nuptial or a post-nuptial debt or obligation (save in such cases as are expressly excepted by sect. 2 of the Married Women's Property Act, 1893); it being provided by the first part of sect. 19 of the Married Women's Property Act, 1882, that:—

“Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument” (d).

There is one class of liabilities which is mentioned for the first time in the Act of 1882, *i.e.*, those to which a married woman is subject under the Acts relating to joint stock companies. Under the old law, if a female contributory married, her husband was, during the marriage, liable to be placed on the list of contributories (e); but if shares in a joint stock company were applied for and registered in the name of a married woman, different considerations arose. For if it appeared that such a contract had been entered into upon the credit of her separate estate, and if the constitution of the company did not preclude married women from being shareholders, she might be placed on the list of contributories in her own right (f). Where the contract was not such as to impose a liability on the wife, and, in fact, to make the shares her separate property, her husband was liable; and it was held (g), that his liability was not limited by the 5th section of the Married Women's Property Act, 1874, to the interest acquired by him in right of his wife, but that he was liable under the

Liability in respect of shares in joint stock companies.

(d) *Birmingham Excelsior Money Society v. Lane*, (1904) 1 K. B. 35, C. A. (1868), L. R., 3 Eq. 781; see also *London, Bombay and Mediterranean Bank* (1881), 18 Ch. D. 581.

(e) Companies Act, 1862, s. 78.

(g) *Exp. Hatcher* (1879), 12 Ch.

(f) *Mrs. Matthewman's case* D. 284.

Chap. II. s. 1. 78th section of the Companies Act, 1862, as a contributory in his own right to the assets of a company which was being wound up, and in which his wife held shares at the time of her marriage, even though held or settled to her separate use (*h*).

This class of contracts is now by the Act of 1882 (*i*) placed on the same footing as other contracts; and a married woman's separate property will be alone liable to satisfy such liabilities.

Against
whom pro-
ceedings
may be taken.

The effect of this legislation is, that in the case of marriages contracted after the 31st of December, 1882, a person suing in respect of any liability incurred by a married woman before marriage may pursue one or other of three remedies. He may proceed by an action (1) against the husband separately; (2) against the wife separately; or (3) against the husband and wife jointly.

Whichever proceeding he may adopt, his remedy may be prejudiced by circumstances, of which he is probably ignorant at the time of bringing his action. If he elect to sue the wife alone, judgment can be enforced only against her separate property, if any; if, on the contrary, he proceed against the husband alone, the liability of the latter is limited to the extent of the property "belonging to his wife which he shall have acquired or become entitled to from or through his wife after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any such debts, contracts or wrongs" (*k*). If he proceed against both husband and wife jointly, he can recover against both husband and wife to the extent of the property which has been already mentioned; but if in any such action, or in any action against the husband alone, it is not found that the husband is liable in respect of any such property of the wife, the plaintiff is bound to pay to the husband his costs of defence, whatever may be the result of the action against the wife jointly sued with him (*l*). The creditor, however, is entitled as against the wife to add these costs to his debt (*m*).

(*h*) See also *Bell's Case* (1879), 4 App. Cas. 547.
(*i*) Sect. 7.
(*k*) 45 & 46 Vict. c. 75, s. 14.

(*l*) *Ibid.* s. 15.
(*m*) *London and Provincial Bank v. Bogle* (1878), 7 Ch. D. 773.

SECTION II.

LIABILITY OF THE HUSBAND AND THE WIFE TO MAINTAIN
EACH OTHER.

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The marriage (which under the old law conferred on the husband the control of his wife's person and estate), imposes on him also the duty of maintaining her; a duty which stands on a foundation of manifest justice; although the *direct methods* assigned by law to enforce it, have for their objects anything rather than the vindication of the rights of injured married women. The only *legal* reason why a husband should support his wife is, that she may not become a burden on the parish. So long as that calamity is averted, the wife has no claim on her husband. And in fact she has no *direct* claim upon him under any circumstances whatever; for even in the case of positive starvation she can only come upon the parish for relief. And then the parish authorities will insist that the husband shall provide for her, when he is able, to the extent at least of sustaining life (*n*). If a husband fail in this respect, so that his wife becomes chargeable to any parish, the 5 Geo. 4, c. 83, s. 3, enacts, that "he shall be deemed an idle and disorderly person, and shall be punishable with imprisonment and hard labour." Nor are strikes and labour disputes, whereby able-bodied men, who could obtain work, throw themselves out of employment, justifiable reasons for avoiding the penalties entailed under this section (*o*). The cost of the wife's maintenance by the parish

Extent of this obligation.

In a direct manner, can be enforced by the parish only.

(*n*) *Rez v. Flintan* (1830), 1 Barn. & Ad. 227; 31 & 32 Vict. c. 122, s. 33.

(*o*) *Att.-Gen. v. Guardians Merthyr Tydfil*, (1900) 1 Ch. 516, C. A.

Chap. II. s. 2. can be recovered from the husband; but he cannot be made to pay for her maintenance a sum greater than the amount of the relief granted to her by the guardians (*p*).

Indirect
method by
which the
wife can
compel her
husband to
maintain her.

But that which cannot be enforced by the wife as a matter of *direct obligation*, can generally be attained in another way. In a word, the wife, as her husband's agent, can bind him for necessaries furnished to her by third parties.

A husband whose wife has left him and committed adultery, is not answerable to the parish for maintaining her (*q*), although he himself has been guilty of adultery since her departure (*r*). And where there is *bonâ fide* belief by a husband that his wife has committed adultery, he is apparently not amenable to proceedings by the guardians for her maintenance (*s*). As to the provisions of the Summary Jurisdiction (Married Women) Act, 1895, see *post*, p. 222.

Liability of
the wife to
maintain her
husband.

There was at one time no correlative obligation on the part of the wife to support the husband; but the Act of 1870 (*t*) made a married woman in England or Ireland having separate property liable for the maintenance of her husband, if he became chargeable to any union or parish, to the same extent that a husband is liable for the maintenance of his wife. This provision was re-enacted almost *verbatim* in the Act of 1882 (*u*), so that now a husband and a wife with property are mutually liable for each other's support.

(*p*) 31 & 32 Vict. c. 122, s. 33;
Dinning v. South Shields Union
(1883), 12 Q. B. D. 61.

(*q*) *Mitchell v. Torrington Union*
(1898), 76 L. T. 724.

(*r*) *Re v. Flintan* (1830), 1 B. &
Ad. 227.

(*s*) *Morris v. Edmonds* (1897), 18
Cox, C. C. 627.

(*t*) 33 & 34 Vict. c. 93, s. 13.

(*u*) 45 & 46 Vict. c. 75.

SECTION III.

LIABILITY OF THE HUSBAND AND THE WIFE TO MAINTAIN
THEIR CHILDREN.

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A father is bound to maintain his children according to his ability, so as to prevent them from becoming chargeable to the poor law, and to prevent himself from becoming liable to proceedings under the criminal law for neglect (*x*); but no similar liability was formerly imposed upon the wife.

Liability of
the husband.

Formerly no
liability on
the wife.

Under the Vagrancy Act, 1824, the liability of the father is, apparently, not avoided by his entering into an agreement with his wife to pay a weekly sum towards the maintenance of his children (*y*).

Moreover, as desertion is a continuing offence, an omission by the father on his release from prison to remove his children from the workhouse constitutes ground for a second conviction (*z*).

But the provisions of the Vagrancy Act apply only to legitimate children (*a*).

Where, however, an illegitimate child is being maintained by

(*x*) *Bazeley v. Forder* (1868), L. R., 3 Q. B. 559; 24 & 25 Vict. c. 100, s. 27; 31 & 32 Vict. c. 122, s. 37; *R. v. Falkingham* (1870), L. R., 1 C. C. R. 222. In order to obtain a conviction under 5 Geo. 4, c. 83, s. 3, evidence that the father has been offered and has refused

work is apparently necessary: *Hosegood v. Camps* (1889), 53 J. P. 612.

(*y*) *Guardians of Westminster v. Buckle* (1897), 61 J. P. 247.

(*z*) *Bannister v. Sullivan* (1904), 91 L. T. 380.

(*a*) *Reg. v. Maude* (1842), 2 Dowling, N. S. 58.

Chap. II. s. 3. the guardians of the poor, justices have jurisdiction, upon application by the guardians, to make an affiliation order against the putative father of the child under sect. 5 of the Bastardy Laws Amendment Act, 1873, although the child's mother has since married, and her husband is able to maintain it (*b*).

Special statutory regulations as to the maintenance of children are also made by sect. 7 of the Prevention of Cruelty to Children Act, 1904 (*c*), in cases where a child is committed to the custody of any person under the provisions of that Act.

There is, however, apparently no statutory liability on a father to pay for the maintenance of his child in a corporation hospital (*d*).

The old law did "not throw on the mother the duty, the legal obligation of maintaining, educating or providing for her children" while her husband was alive (*e*).

43 Eliz. c. 2. The Poor Law Act of Elizabeth (*f*) enacted that—

"The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person, not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person."

But the liability thus imposed attached to the husband during his life, so that no liability attached to the wife during coverture, it being held that the words "mother and grandmother" must be read as if the description were "mother and grandmother not being under coverture" (*g*); and the House of Lords refused to order a married woman, who possessed separate property, and who had eloped, to contribute to the maintenance of the children of the marriage, although the husband stated in his petition that his own means were not sufficient (*h*).

All relief given under the poor laws to any child under

- | | |
|--|---|
| (<i>b</i>) <i>Guardians of Plymouth v. Gibbs</i> , (1903) 1 K. B. 177. | Cl. & Fin. 323, per Lord Brougham, at p. 374. |
| (<i>c</i>) 4 Edw. 7, c. 15. | (<i>f</i>) 43 Eliz. c. 2, s. 7. |
| (<i>d</i>) <i>Hull Corporation v. Maclaren</i> , reported in Local Government Chronicle, June, 1898; and see 68 J. P. 319. | (<i>g</i>) <i>Custodes v. Jinks</i> (1651), Sty. 283; <i>Coleman v. The Overseers of Birmingham</i> (1881), 6 Q. B. D. 615. |
| (<i>e</i>) <i>Hodgens v. Hodgins</i> (1837), 4 | (<i>h</i>) <i>Hodgens v. Hodgins</i> (1837), 4 Cl. & Fin. 323. |

sixteen is to be considered as being given to the father, or, if he is dead, to the widow (*i*); and under the statutes relating to reformatory and industrial schools (*k*), the parent or other person liable for the maintenance of the child sent to such a school may be ordered to contribute to its maintenance there. Prior, therefore, to the Act of 1870, there was no liability on a married woman to support her children while her husband was alive.

The Married Women's Property Act, 1870 (*l*), enacted that—

"A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children."

The Act of 1870 imposed on a woman possessing property the same liability as a widow to maintain her children, but not her grand-children.

This section did not make a woman whose husband was alive liable to contribute to the support of her *grandchildren*, even though she had separate estate.

The liability of the wife has, however, been extended by the Married Women's Property Act, 1882 (*m*), which enacts, in sect. 21, that—

"A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children and grandchildren."

The Act of 1882 makes her as liable as her husband to maintain both children and grandchildren, but does not relieve him of his liability.

A married woman having separate property is therefore now liable as well as her husband for the maintenance of her children and grandchildren. But the husband is not relieved from his liability; so that, unless it can be considered that the husband and wife are now concurrently liable, the

- (*i*) 4 & 5 Will. 4, c. 76, s. 56. c. 23; 56 & 57 Vict. c. 48; 57 &
 (*k*) 29 & 30 Vict. c. 117, s. 25; 58 Vict. c. 33; 62 & 63 Vict. c. 12;
 c. 118, s. 39. Subsequent Acts relating to reformatory and industrial schools are 35 & 36 Vict. c. 21; 1 Ed. 7, c. 20, s. 9; 4 Ed. 7, c. 27.
 37 & 38 Vict. c. 47; 54 & 55 Vict. (*l*) 33 & 34 Vict. c. 93, s. 14.
 (*m*) 45 & 46 Vict. c. 75, s. 21.

Chap. II. s. 3. husband still remains primarily liable, and recourse cannot be had to the wife's property until and unless he is unable to maintain the children. It would seem that a married woman having separate property, who has been deserted by her husband, will now be liable to conviction under the Vagrancy Act, 5 Geo. 4, c. 83, s. 4, if she runs away and leaves her children chargeable to the parish (*n*).

Illegitimate
children.
Maintenance
by mother.

In the case of illegitimate children, it is provided by section 6 of the Bastardy Laws Amendment Act, 1873 (*o*), that: "Every woman neglecting to maintain her bastard child, *being able wholly or in part to do so*, whereby such child becomes chargeable to any parish or union, shall be punishable as an idle and disorderly person, under the provisions of the Vagrancy Act, 1824."

A parent is not bound by law to pay the debts of his children unless he has impliedly or expressly given the child authority to incur them (*p*).

Husband
liable to
maintain his
wife's prior
children.

Another consequence of the marriage is that the husband becomes bound to maintain, *as part of his family*, any child or children till the age of sixteen, legitimate or illegitimate, whom his wife may have at the time of entering into the contract. This obligation was imposed by the 4 & 5 Will. 4, c. 76, s. 57 (*q*), and has not been restricted by subsequent legislation (*r*).

There is no obligation on the part of the wife to maintain her husband's children by a former marriage.

(*n*) Conf. *Peters v. Cowie* (1877), 2 Q. B. D. 131, 136. (1823), 1 C. & P. 1; *Mortimore v. Wright* (1840), 6 M. & W. 482.

(*o*) 36 Vict. c. 9.

(*q*) *Re Wendron* (1838), 7 Ad. & E. 819.

(*p*) *Law v. Wilkin* (1837), 6 Ad. & E. 718; *Blackburn v. Mackey*

(*r*) But see *Guardians of Plymouth v. Gibbs*, (1903) 1 K. B. 177.

CHAPTER III.

LIABILITIES ARISING FROM ACTS DONE IN THE MARRIAGE STATE.

SECTION I.

LIABILITY OF THE WIFE FOR CRIMINAL OFFENCES.

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FORMERLY a wife could not, while under coverture, contract civil liability unless she possessed separate estate; but crimes committed by her were always personal to herself, and for criminal offences she is liable to be punished as if she were a *feme sole*. But this statement must be understood as referring to offences committed by her alone, that is to say, apart from her husband, for the presumption of law is that when a felonious act is committed by a wife in the presence of her husband, it is done under his coercion and control, and she is excused from punishment; but this presumption may be rebutted by evidence, and if it appear that the wife was principally instrumental in

The wife
liable for her
crimes.

Unless under
her husband's
coercion.

Chap. III. s. 1. the commission of the crime, that she acted voluntarily and not by restraint of her husband even though he was present, she will be liable to punishment (a).

This rule is as old as the time of Bracton (b), who, after first propounding the question, "*si uxor cum viro conjuncta fuerit, vel confessa quod viro suo consilium præstiterit et auxilium, numquid tenebuntur ambo?*" subsequently says by way of answer, "*sicut sunt participes in crimine, ita erunt participes in pœna*" (c).

If a husband and wife are jointly indicted for receiving stolen goods, it has been held that the wife cannot be convicted, unless the jury have been asked whether she received the goods in the absence of her husband (d). It has, however, been held in a recent case (e), that there is nothing in the marital relation *per se* to protect a wife under such circumstances, and even if the husband was in the immediate neighbourhood, it is a question for the jury to decide whether or no the wife was acting independently and of her own initiative.

Distinction
between
felony and
misdemeanor.

The acquittal of a wife who was indicted with her husband for a misdemeanor for uttering counterfeit coin, was directed in one case on the ground that the distinction between the effect of coercion in felonies and misdemeanors did not exist (f); but in a subsequent case, before the twelve judges, the Court was of opinion that the point as to a coercion of a wife by her husband did not arise, as the result of the case was a conviction for misdemeanor (g).

A wife is not answerable for a husband's neglect to provide food for an apprentice (h).

(a) 1 Hale, 516; *R. v. Cohen* (1868), 11 Cox, 99; *R. v. Smith* (1858), 1 Dea. & B. C. C. 553.

(b) Book 3, c. 32, s. 10.

(c) And see *Brown v. Att.-Gen. of New Zealand*, (1898) A. C. 234.

(d) *R. v. Archer* (1826), 1 Mood. C. C. 143; *R. v. Wardroper* (1860), 1 Bell, C. C. 249; 29 L. J. Rep., M. C. 116.

(e) *Reg. v. Baines* (1900), 82 L. T. 724, C. C. R.

(f) *R. v. Price* (1837), 8 C. & P. 19.

(g) *R. v. Cruse* (1838), 8 C. & P. 541; *R. v. Ingram* (1712), 1 Salk. 384. See also Stephen's Digest of the Criminal Law, 5th ed. 23. And as to misdemeanors in general, *Rex v. Price* (1837), 8 C. & P. 19.

(h) *Rex v. Squire*, Stafford Lent Assizes, 1799, M.S., cited in note to Russell on Crimes, 6th ed., vol. 1, p. 151.

In Hale's Pleas of the Crown (vol. 1, pp. 45, 47) it is laid down that when a crime is committed by husband and wife jointly, the presumption of law is, that the wife is acting under the coercion of her husband except in cases of *treason* and *murder* (i). In a later part of his work (pp. 434, 516) he makes an additional exception in the case of *manslaughter*. Serjeant Hawkins (k) states the only three exceptions to be *treason*, *murder* and *robbery*, and these in Russell on Crimes are stated to be the exceptions (l). Mr. Greaves, however (one of our highest authorities on criminal law), in a note on this passage in Russell, says, "I can find no *decision* which warrants the position in the text as to treason, murder or robbery"; and Mr. Justice Stephen says that the principle does not apply to high treason or murder, and probably not to robbery.

Chap. III. s. 1.

Except in certain cases.

A wife may be indicted jointly with her husband for keeping a brothel or gaming house (m), or for a forcible entry (n).

It may be gathered from a review of the above authorities, that at present it is not very clear how far the *prima facie* presumption of law, as to the wife acting under the coercion of her husband, extends, although it seems to be generally assumed that it is excluded in cases of treason and murder, as well as in cases of misdemeanor (o).

How far the presumption extends.

The presumption of coercion may also be rebutted by showing that the husband was bed-ridden or a cripple at the time of the offence being committed (p).

Presumption of coercion may be rebutted.

Where a wife elopes, and she and her paramour jointly carry off the husband's property, the paramour could always be con-

Paramour may be convicted of larceny.

(i) As regards joint liability of husband and wife in murder, see *Reg. v. Manning* (1849), 2 C. & K. at pp. 903—905.

(k) Hawkins' Pleas of the Crown, vol. 1, p. 4, 8th ed. See, however, editorial note on the third exception.

(l) 6th ed., vol. 1, p. 146.

(m) *Reg. v. Dixon* (1716), 10 Mod. 335; *Reg. v. Williams* (1712), 1 Salk. 383.

(n) 1 Hale, 21; 1 Hawk. c. 64, s. 35. The subject of the wife's criminal responsibility will be found fully treated in Russell on Crimes, 6th ed., vol. 1, p. 146 *et seq.*

(o) *R. v. Cruse* (1838), 8 C. & P. 541; *R. v. Torpey* (1871), 12 Cox, C. C. 45, at p. 48.

(p) *R. v. Cruse* (1838), 2 Moo. C. C. 53, at p. 57.

Chap. III. s. 1. victed of larceny, provided that there was also evidence of adulterous intercourse between the parties (*g*).

Under the Act of 1882 husband and wife may be prosecuted for taking each other's goods in certain cases.

Under the Married Women's Property Act, 1882, a wife who wrongfully takes away property of her husband when leaving or deserting, or about to leave or desert him, is made liable to criminal proceedings by her husband; so that if property belonging to the husband is taken by the wife, or with her consent or privity, when she is deserting him, she will now be liable to prosecution; for in the circumstances specified in these sections a husband and wife are made liable to criminal proceedings by each other (*r*); and, consequently, a person who receives such property of a husband or wife so illegally dealt with by either, will not now be protected against criminal proceedings (*s*).

Husbands and wives competent to give evidence for or against each other in civil proceedings.

At common law husbands and wives were incapable of giving evidence for or against each other in either civil or criminal proceedings; but the result of various statutes is, that now in any civil proceeding the husbands and wives of the parties thereto, and of the persons in whose behalf any such proceeding is brought, instituted, opposed or defended, are competent and compellable to give evidence (*t*) on behalf of either or any of the parties to the proceeding: communications made to each other during marriage being privileged (*u*).

It is also provided by sect. 4 of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), that—

When husband or wife in criminal proceedings may be called without consent of person charged.

"The wife or husband of a person charged with an offence" under (a) the Vagrancy Act, 1824, ss. 3, 4; (b) the Offences against the Person Act, 1861, ss. 48, 52, 53, 54; (c) the Married Women's Property Act, 1882, ss. 12 and 16 (*x*); (d) the Criminal Law Amendment Act, 1885 (whole Act), "may be called as a witness either for the prosecution or defence without the consent of the person charged."

As to whether, under the above section, the wife or husband

(*g*) *R. v. Berry* (1859), 28 L. J., M. C. 70; *R. v. Avery* (1859), *ibid.* 185.

(*r*) Sects. 12, 16; and see *Rex v. James*, (1902) 1 K. B. 540.

(*s*) See *R. v. Kenny* (1877), 2 Q. B. D. 307.

(*t*) 16 & 17 Vict. c. 83; 40 & 41 Vict. c. 14.

(*u*) 16 & 17 Vict. c. 83, s. 3; see also 61 & 62 Vict. c. 36, s. 1 (*d*).

(*x*) See *Rex v. James*, (1902) 1 K. B. 540.

who is called as a witness can or cannot be compelled to attend and give evidence against his or her will, the Act is completely silent. It has, however, been held by Wills, J., in *The Queen v. Ellis* (y), a case of abduction followed by marriage, that the wife was a compellable witness against her husband. Judging from the analogy afforded by other Acts of Parliament (apart from the decision of the Court in the case above cited), it is, nevertheless, difficult to construe the provisions of this Act as implying compulsion as well as competence.

Chap. III. s. 1.

Thus, in the Evidence Amendment Act, 1853, the words used in sect. 1 are "competent and compellable." Again, in the Evidence Act, 1877, sect. 1 states that "the wife or husband of any such defendant shall be admissible witnesses, and compellable to give evidence." Whilst in the Act now under discussion there is no suggestion of compulsion other than the words "may be called as a witness . . . without the consent of the person charged."

If these words, which are in their ordinary sense no more than permissive, can be rightly construed as implying compulsion, so far as the witness is concerned, the Criminal Evidence Act, which was passed ostensibly in the interests of accused persons, has imported an entirely new principle into the administration of criminal justice: the whole tenor of English law having been hitherto averse to the idea that those bound together in the closest relationship of human life should be compelled, unwillingly, in criminal cases, to bear testimony against each other.

It is provided by 32 & 33 Vict. c. 68, s. 3, that—

"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceedings."

When husband and wife are competent but not compellable witnesses.

The Prevention of Cruelty to Children Act, 1904 (z), also provides by sect. 12 that—

"In any proceeding against any person for an offence under this Act, or for any offences mentioned in the first schedule to this Act (a) . . .

(y) (1899), 34 Law Journal Paper, 646.

(z) 4 Edw. 7, c. 15.

(a) First schedule—"Any offence under sects. 27, 55 or 56 of the Offences Against the Person Act,

Chap. III. s. 1. the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent, but not compellable, to give evidence."

Statutory exceptions in criminal proceedings.

There are also not a few statutory exceptions to this common law rule, such as those enacted in the Licensing Act, 1872 (*l*); in the Sale of Food and Drugs Act, 1875 (*c*); in the Conspiracy and Property Protection Act, 1875 (*d*); in 40 & 41 Vict. c. 14, where an indictment is tried for the purpose of enforcing a civil right only; in the Army Act, 1881 (*e*), and in the Explosives Act, 1883 (*f*); for by all these statutes husbands and wives are made competent witnesses for or against each other for the purposes of those Acts (*g*).

In cases of high treason it has been suggested that the evidence of a wife would be received against her husband (*h*).

Act of 1882, ss. 12, 16.

The Married Women's Property Act, 1882 (*i*), provides by sect. 12, that—

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as a *feme sole*; but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give

1861, and any offence against a child under the age of sixteen years, under sects. 5, 42, 43, 52 or 62 of that Act, or sect. 11 of the Criminal Law Amendment Act, 1885. Any offence under the Dangerous Performances Acts, 1879 and 1897. Any other offence involving bodily injury to a child under the age of sixteen years"; and see *Advocate (H. M.) v. Fraser* (1901), 3 F. (Just. Cns.), 67, Court of Justiciary (a case under the repealed Act).

(*b*) 35 & 36 Vict. c. 94, s. 51, sub-s. 4.

(*c*) 38 & 39 Vict. c. 63, s. 21.

(*d*) 38 & 39 Vict. c. 86, ss. 4, 5, 6, 11.

(*e*) 44 & 45 Vict. c. 58, s. 156, sub-s. 3; and see 61 & 62 Vict. c. 36, s. 6, sub-s. 2.

(*f*) 46 & 47 Vict. c. 3, s. 4, sub-s. 2.

(*g*) See on this subject generally. Phipson on Evidence, 3rd edit., p. 413.

(*h*) *Mary Grigg's case* (1661), Thos. Raymond, p. 1; but see Taylor on Evidence, vol. ii. (ed. 9), p. 894, s. 1372.

(*i*) 45 & 46 Vict. c. 75, ss. 12, 16, as amended by 47 & 48 Vict. c. 14.

evidence against each other, any statute or rule of law to the contrary Chap. III. s. 1. notwithstanding: provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife."

And by sect. 16, that—

"A wife doing any act with respect to any property of her husband, which if done by the husband with respect to property of the wife would make the husband liable to criminal proceedings by the wife under this Act, shall, in like manner, be liable to criminal proceedings by her husband "(j).

Section 12 deals with both civil and criminal proceedings; its main provisions are directed to those cases in which the wife will be the plaintiff or prosecutrix, and the section then enacts that in "any proceeding under this section a husband or wife shall be competent to give evidence against each other." Sect. 16 only deals with criminal proceedings taken by the husband against the wife. Prior to the passing of the Married Women's Property Act, 1884 (47 & 48 Vict. c. 14), it was decided (k) that the power given to husbands and wives to give evidence against each other was only given with reference to cases which arose under sect. 12, and, therefore, that although a wife could give evidence against her husband in criminal proceedings taken by her against him under that section, yet that a husband could not give evidence against his wife when he took criminal proceedings against her pursuant to the provisions of sect. 16. This inequality was, however, removed by the amending Act, 1884.

Husbands and wives competent to give evidence against each other in cases arising under section 12.

Reference to sects. 12 and 16 of the Married Women's Property Act, 1882, is also made in sect. 4 and schedule of the Criminal Evidence Act, 1898.

(j) 45 & 46 Vict. c. 75, ss. 12, 16,
as amended by 47 & 48 Vict. c. 14.

(k) *R. v. Brittleton* (1883), 12 Q.
B. D. 266.

Chap. III. s. 1.

Meaning of
deserting or
leaving.

What constitutes desertion has been much considered in connection with proceedings under the Acts constituting the Court for Matrimonial Causes, and the cases decided on those statutes are discussed in the chapter devoted to that subject (*l*). The question has also arisen in cases connected with the administration of the poor law, where a husband, who ordered his wife to leave his house in consequence of her adultery, was considered to have deserted her within 24 & 25 Vict. c. 55, s. 3 (*m*), while it was held that there was no such desertion where the wife departed from the home of her own free will (*n*); but there seems no reason to suppose that the word "deserting" is used in this section in any particular technical sense.

SECTION II.

LIABILITY FOR TORTS OF THE WIFE.

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2. <i>And after Coverture ended if she acted as his Agent</i> . .	92	5. <i>The Husband now not liable for his Wife's Breaches of Trust unless he has inter-meddled</i>	94
3. <i>Not liable for Fraud connected with Contract</i>	93		

The husband
formerly
liable during
coverture for
wife's torts.

Where the act of the wife without being positively criminal was yet illegal, where, for instance, she committed a fraud, or published a libel, her husband was formerly liable at law; for a married woman could not, strictly speaking, commit torts while under coverture: they were the torts of her husband and he was

(*l*) See *post*, Chap. VIII. See also Summary Jurisdiction (Married Women) Act, 1895, at p. 222.

(*m*) *Reg. v. Maidstone Union* (1879), 5 Q. B. D. 31. For a recent decision as to irremovability under

the poor laws, see *Guardians of Tewkesbury v. Guardians of Birmingham*, (1904) 2 K. B. 395.

(*n*) *R. v. Cookham Union* (1882), 9 Q. B. D. 522.

liable (o). This liability was based upon a principle of necessity Chap. III. s. 2. as well as justice, for as by the common law of England the wife could not be sued alone, the person injured by her would, if the husband had been free from liability, have been left without redress. It was, therefore, necessary to sue the husband and wife jointly (p), and he remained liable for ante-nuptial as well as post-nuptial torts to the full extent of the damages recovered as long as the coverture existed, even though they were living apart (q), unless it were established that the wife Exceptions. was living in adultery, or that a decree of divorce (r) or judicial separation (s) had been pronounced, or unless she had obtained a protection order under 20 & 21 Vict. c. 85. Whether, however, a decree of judicial separation either had, or has, like a divorce, the effect of causing a vested right of action to abate is not absolutely clear.

On the death of the wife, or the dissolution of the marriage, His liability the husband ceased to be liable for torts committed by the wife ceased on the alone during the coverture, unless they were committed by her termination of coverture. as his agent, and it would seem that if the wife survived her husband, she was held liable for such torts, unless redress had already been had (t).

Subsequently to January 1st, 1883, the hitherto un- Liability of limited liability of a husband for his wife's ante-nuptial husband under Act of torts has been reduced (by virtue of sect. 15 of the Married Women's Property Act, 1882) to the extent of the property acquired by him through his marriage. There is, however, no such limitation to the husband's liability for torts committed by his wife during coverture (u). For though a married woman may now both sue and be sued in tort as if she were a *feme sole* . . . and any damages and costs recovered against her shall be payable out of her separate property, and

(o) *Wainford v. Heyl* (1875), L. R., 20 Eq. 321.

(p) *Catterall v. Kenyon* (1842), 3 Q. B. 310; *Keyworth v. Hill* (1820), 3 B. & Ald. 685.

(q) *Hrad v. Briscoe* (1833), 5 C. & P. 484.

(r) *Capel v. Powell* (1864), 17 C. B., N. S. 743.

(s) 20 & 21 Vict. c. 85, s. 26.

(t) *Vine v. Saunders* (1837), 4 Bing. N. C. 96.

(u) *Seroka v. Kattenburg* (1886), 17 Q. B. D. 117; *Earle v. Kingscote*, (1900) 2 Ch. 585, C. A.

Chap. III. s. 2. not otherwise (*w*), this statutory alteration in the law does no more than afford a person injured by the torts of a married woman an alternative remedy. Such person may now—the words of the statute are permissive, not obligatory (*x*)—sue a wife without joining her husband, and if successful in his action may recover all the damages awarded him out of her separate estate; but such action will exhaust his remedies, and no subsequent proceeding in respect of the same tort will be maintainable. Or, alternatively, he may have recourse to the remedies in existence before the passing of the Married Women's Property Acts, the old common law action against the husband and wife jointly in respect of the torts of the wife still existing as a concurrent method of procedure. In this latter case, however, there cannot be separate judgments against husband and wife, a verdict in favour of one being tantamount to a verdict in favour of both, and it exhausts the whole cause of action. Consequently, as a necessary sequence to the fact that separate judgments are not possible, a payment into Court by the husband in satisfaction of the claims, coupled with a denial of liability by the wife, is not an admissible method of pleading (*y*). The whole gist of the alteration in law effected by the Married Women's Property Act, as regards this particular branch of the subject, is, apparently, to make a married woman liable to be sued in contract, tort, or otherwise upon any ground on which a *feme sole* could be sued. Nor is it a condition precedent to such liability that she should, in fact, be possessed of separate estate (*z*). The mere circumstance that she has no property of her own does not render her the less amenable to law. It merely raises a question as to the expediency of suing a person who is financially unable to satisfy any judgment that may be obtained against her (*a*), and who, upon default, cannot be imprisoned (*b*). A husband is, how-

Husband's
liability for

(*w*) 45 & 46 Vict. c. 72, s. 1,
sub-s. 2.

(*x*) *Earle v. Kingscote*, (1900) 2
Ch. 585, Rigby, L. J., at p. 591.

(*y*) *Beaumont v. Kaye*, (1904) 1
K. B. 292.

(*z*) 56 & 57 Vict. c. 63, s. 1.

(*a*) *Whittaker v. Kershaw* (1890),
45 Ch. D. 320, C. A.

(*b*) *Scott v. Morley* (1887), 20
Q. B. D. 120.

ever, and always was responsible for a fraud committed by his wife as his agent, on the general rule that a principal is answerable for the fraud of his agent acting within the scope of his authority for the benefit of the principal (c), and it makes, of course, no difference that the agent happens to be the wife of the principal; so that a tradesman who, being desirous of selling a business, allowed his wife to give information as to the profits of the business, was held liable for fraudulent representations made by her to a purchaser (d).

Chap. III. s. 2.

torts of wife acting as his agent.

The provisions of the Married Women's Property Acts do not interfere with the principles of the law of agency; they do, however, remove difficulties which arose in cases where a married woman made a fraudulent representation in connection with a contract, for it was held that no action would lie against a husband and wife for a fraudulent representation made by the wife that she was a *feme sole*, by which she induced the plaintiffs to advance money to a third person and to accept her as surety, because the fraud was directly connected with the contract made with the wife (e). Where a married woman falsely represented that the signature to a bill of exchange was that of her husband, the Court was equally divided in opinion on the question whether an action could be maintained (f). Now, however, a married woman who commits a fraud in connection with a contract, or who obtains credit by false representations, will be liable to the extent of her separate property. But where the original contract was not induced by the subsequent fraud, but was altogether separable from and independent thereof, the old common law doctrine of the liability of a husband for the torts of his wife still applies (g).

Not liable formerly for fraud of wife connected with a contract.

Wife now liable.

Under the old law, that is, prior to the 1st January, 1883, the husband was held answerable for his wife's breaches of trust, devastavits, or other wrongful acts done by her as trustee, execu-

Wife liable for breaches of trust and devastavits.

(c) *Mackay v. Commercial Bank of New Brunswick* (1874), L. R., 5 P. C. 394; *Barwick v. Joint Stock Bank* (1867), L. R., 2 Ex. 259; 36 L. J., Ex. 147.

(d) *Taylor v. Green* (1837), 8 Q. & P. 316.

(e) *The Liverpool Adelphi Loan Association v. Fairhurst* (1854), 9 Ex. 422.

(f) *Wright v. Leonard* (1861), 11 C. B., N. S. 258.

(g) *Earle v. Kingscote*, (1900) 2 Ch. 585.

Chap. III. s. 2. trix or administratrix, on the ground that these were offices which she could assume only with his sanction and approbation. This liability, however, ceased with the termination of the coverture, except as to assets he might have received (*h*), and has been entirely taken away by the Married Women's Property Act, 1882. By this Act, married women are rendered liable for any breach of trust or devastavit committed either before or after marriage, and the husband is declared to be not subject to any liability, unless he has acted or intermeddled in the trust or administration (*i*).

Husband and wife now both liable for her general torts.

As already stated, the Married Women's Property Act, 1882, does not specifically abolish the liability of a husband for torts committed by his wife during coverture; but it enables the wife to be sued alone for her torts (*k*), in which case any damages or costs recovered against her will be payable out of her separate property, and not otherwise. It is therefore open to a plaintiff to sue the husband and the wife jointly, or to sue the wife alone. If he adopts the former course, he will, if successful, obtain a judgment, which can be enforced against the wife to the extent of her separate property, and should that be insufficient, against the husband; if he sues the wife alone, he will be able to enforce the judgment against her alone to the extent of her separate property.

Claims by or against husband and wife may be joined with claims by or against either of them separately, and if a husband and wife are both made defendants, they must both be served with the writ unless the Court or a judge shall otherwise order (*l*).

(*h*) Williams' Executors, 10th ed., pp. 1480—1482; *Smith v. Smith* (1856), 21 Beav. 385; *Clough v. Bond* (1838), 3 My. & Cr. 490; *Clifford v. Washington* (1879), 48 L. J., Ch. 205.

(*i*) 45 & 46 Vict. c. 75, s. 1,

sub-s. 4, and s. 24; and see *ante*, p. 94; and *post*, p. 148.

(*k*) *Ibid.* s. 1, sub-s. 2. Rules of Court, 1883, Ord. XXXIV. r. 4.

(*l*) Rules of Court, 1883, Ord. XVIII. r. 4, and Ord. IX. r. 3.

SECTION III.

LIABILITY DURING COHABITATION FOR THE CONTRACTS OF
THE WIFE.

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The principle, as deduced from the leading case of *Manby v. Scott* (m), on which a husband is held liable for his wife's contracts, is that she is acting as his agent and with his authority. Wife the agent of husband.

In *Debenham v. Mellon* (n), the House of Lords approved of the judgment of the majority of the Court in *Jolly v. Rees* (o), and held that neither marriage nor cohabitation implies of itself a mandate in law making the wife, except in the case of necessity, the agent in law of the husband to bind him, and to pledge his credit. No doubt, as a rule, the ordinary state of *Debenham v. Mellon.*
As a rule, marriage

(m) 1 Levinz, 4; 1 Siderfin, 109;
Smith's L. C., 11th ed., vol. 2, 446.

(n) (1880), 6 App. Cas. 24.
(o) (1864), 15 C. B., N. S. 628.

Chap. III. s. 3. cohabitation between husband and wife does carry with it some presumption and some *prima facie* evidence of an authority to manage certain departments of the household expenditure, and to pledge the credit of the husband in respect of matters coming within that department, regard being had to the situation in life and position in society of the husband. But this authority only relates to such things as ordinarily fall within the domestic department usually confided to the wife, and where the articles bought upon credit are necessities of such a kind and character as persons in that class of life are in the habit of ordering upon credit (*p*). The presumption is not absolute, and may be rebutted by proof that the wife was supplied with necessities (*q*), or with money to pay for such necessities (*r*), or that the husband had forbidden his wife to pledge his credit (*s*), or had fixed a limit which she was not to exceed (*t*); for otherwise the principles of agency, upon which the liability of the husband is based, would be practically of no effect (*u*). If a husband has so conducted himself as to make it inequitable for him to deny his wife's authority, if he has by prior mandate or subsequent ratification authorized his wife to pledge his credit, or if he has so conducted himself as to entitle persons dealing with her to believe that she had his authority so to act, then the authority or consent so expressly or impliedly given cannot be got rid of by a private arrangement between him and his wife not communicated to third parties affected by it (*x*).

affords *prima facie* evidence of authority.

This presumption may be rebutted.

The presumption if raised is strongest when the domestic manager is the wife; but it may also arise in the case of any

(*p*) *Phillipson v. Hayter* (1870), L. R., 6 C. P. 38; *Shepherd, Exp.* (1879), 10 Ch. D. 573, C. A.; *Etherington v. Parrott* (1704), 1 Salk. 118; *Waithman v. Wakefield* (1807), 1 Camp. 120. The term "necessaries" is a particularly elastic one, and has been held to include a bill of 60*l.* for cut flowers for table decoration: *Goodyear v. Part* (1897), 13 T. L. R. 395.

(*q*) *Mizen v. Pick* (1837-8), 3 M.

& W. 481.

(*r*) *Morel v. Westmoreland (Earl of)*, (1904) A. C. 11; *Reneaux v. Teakle* (1853), 8 Ex. 680.

(*s*) *Debenham v. Mellon* (1880), *supra*; *Jolly v. Rees* (1864), *supra*.

(*t*) *Goodyear v. Part* (1897), 13 T. L. R. (Pollock, B.) at p. 396.

(*u*) *Clifford v. Laton* (1827), 3 C. & P. 15.

(*x*) *Drew v. Nunn* (1879), 4 Q. B. D. 661.

other person placed in the position of manager of a domestic establishment (*y*). In all cases where, prior to the Married Women's Property Act, 1882 (*z*), a tradesman sued the husband for goods supplied to his wife, the burthen of proof was on the plaintiff to show that they were necessaries suited to the condition of the husband (*a*), that she was not supplied with them or with money by her husband, or that the wife made the contract with the knowledge and assent of the husband, or that he had expressed no disapproval of the purchase, and so ratified the contract (*b*). And it would seem that even since that Act, if a tradesman sue the husband he must, in order to succeed, produce similar proof.

Chap. III. s. 3.

Onus of proof is on party seeking to charge the husband.

If, since the Acts of 1882 and 1893, a tradesman were to sue the wife for such necessaries, on the ground that she entered into the contract, and that her property was therefore liable, the onus of displacing her liability is now thrown upon the wife. It is apprehended that evidence of the same kind, which formerly rendered a husband liable, will now displace the wife's liability, and will in effect show that the contract was not entered into by her with respect to her separate property.

In the recent case of *Paquin v. Holden* (*c*), the decision of the Court of Appeal has gone a long way towards crystallizing the law on this very important subject. In this case the defendant, Mrs. Mary Holden (who was admittedly a married woman living with her husband), though without separate estate, possessed a current banking account in her own name, which was fed by her husband, and from time to time drew cheques thereon in payment of accounts rendered to her by the plaintiffs. Subsequently to Messrs. Paquin giving credit, Mr. Holden got into financial difficulties, and was ultimately adjudicated bankrupt. The plaintiffs thereupon sought to recover the amount of their bill from Mrs. Holden, alleging that she had bought the goods

Paquin v. Holden.

(*y*) *Debenham v. Mellon* (1880), 6 App. Cas. 24.

(*z*) 45 & 46 Vict. c. 75. See also 56 & 57 Vict. c. 63.

(*a*) *Phillipson v. Hayter* (1870), *supra*.

(*b*) *Montague v. Benedict* (1825), 3 B. & C. 631; 2 Sm. L. C., 11th ed., 476; *Lane v. Ironmonger* (1844), 13 M. & W. 368.

(*c*) *Paquin v. Holden* (1905), 21 T. L. R. 361.

Chap. III. s. 3. on her own credit, and not as agent for her husband. In defence, Mrs. Holden traversed this allegation, pleading that she had ordered the goods, which were admittedly necessities, as agent for, and with the express knowledge and consent of, her husband, and consequently was not personally liable.

The Master of the Rolls (Collins), in giving judgment for the defendant upon these facts, thus defines the law:—

“By sect. 1, sub-sect. 2, of the Married Women's Property Act, 1882, a married woman was made capable of entering into, and rendering herself liable in respect of, and to the extent of her separate property as if she were a *feme sole*; and by sub-sect. 3 (since repealed), ‘every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.’

“Up to that time,” he remarked, “speaking generally, a married woman was incapable of entering into a contract. She could, however, contract as agent for her husband.

“It was a wide section, but in 1893 the Married Women's Property Act, 1893, was passed, which, by sect. 1, extended the scope of sect. 1 of the Act of 1882. That section provided that ‘every contract hereafter entered into by a married woman, *otherwise than as agent*, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not possessed of or entitled to any separate property at the time when she enters into such contract’; and by sect. 4 of the Act of 1893, sub-sects. 3 and 4 of the Act of 1882 were repealed. Therefore, if this contract was one entered into by the defendant as agent, the Act of 1893 did not apply; nor did the Act of 1882 apply, because the defendant had no separate property at the time when she entered into the contract, or, indeed, at any time; consequently the plaintiffs were thrown back upon the common law, under which no liability was imposed upon the defendant.”

Proceeding, the Master of the Rolls pointed out that the crucial question was whether the contract was in point of fact made by the defendant as agent, not whether in point of form it was made as agent, or whether it could be construed so as to admit of a possible personal liability. To him it seemed to be clear that the contract was not a contract entered into “otherwise than as agent,” and consequently the provisions of the Married Women's Property Act did not apply, and liability on the part of the defendant was not established.

How pre-
sumption of
liability of
husband may
be rebutted.

The presumption of the authority of a wife to contract as agent for her husband may, however, be rebutted by showing that the husband had given warning to the tradesman not to supply his wife with goods (*d*), or that he had forbidden

(*d*) *Etherington v. Parrott* (1704), 1 Salk. 118.

her to pledge his credit, or that she was already sufficiently supplied with articles of the same character as those for the price of which he was sued, and which were supplied to her without his knowledge (*e*). But if he knew of the extra commodities supplied upon his wife's order, if his family had had the benefit of them, and if, in fact, he himself, in his own person, had helped to appropriate or consume them, none of the decisions or dicta imply that he would not be liable. On the contrary, it may be assumed that he would be bound in such a case, although he were to prove that his establishment was, by his own order, sufficiently and even amply supplied with all necessary articles (*f*). Even the extravagant nature of the order, although it *may* not be alone sufficient to rebut the presumption of her agency, yet may be properly left to the jury as evidence to negative the husband's authority (*g*). The proper question for the jury, even where the husband is living with his wife, is not merely whether the goods, in respect of which the action is brought, were necessities suitable to her station, but whether upon the facts proved she had any authority, express or implied, to bind her husband by the contract; and where the former question alone was put the Court granted a new trial (*h*).

The question as to what are necessities is one for the jury, though it is for the judge to determine whether there is evidence that ought reasonably to satisfy a jury that the articles in question are necessities or not (*i*).

"The word necessities," says Byles, J., in *Jolly v. Rees* (*k*), "is not free from ambiguity. It may import simply things

Chap. III. s. 3.

As to what are necessities, a question for jury.

Definition of term "necessaries."

(*e*) *Renaux v. Teakle* (1853), 8 Ex. 680.

(*f*) See 2 Rop. 112, where he says in a marginal note, "If the articles bought be not necessities, yet if they come to the husband's use, he will be liable." This is justice and good sense at all events; but he cites no decision or dictum. In his text at the same place he says the husband will be liable

where "he allows the wife to retain and enjoy" the articles.

(*g*) *Lane v. Ironmonger* (1844), 13 M. & W. 368; *Spreadbury v. Chapman* (1838), 8 C. & P. 371.

(*h*) *Reid v. Teakle* (1853), 13 C. B. 627.

(*i*) *Ryder v. Wombwell* (1868) (Ex. Ch.), L. R., 4 Ex. 32.

(*k*) (1864), 15 C. B., N. S. 628.

Chap. III. s. 3. suitable to the station of the party, supplied without reference to the supply or means of supply from other sources; or it may import things not only suitable, but requisite or indispensable, because not supplied from any other source. And these last again are divisible into two classes: those which are indispensable without any fault of the party supplied, and those which are indispensable because the party supplied has wasted supplies, or the means of supply, from other quarters." From this definition given by the learned judge of the word "necessaries," it is obvious that the meaning to be attached to the term must depend upon the facts of each particular case.

When husband not liable.

A husband who supplies his wife with necessaries suitable to her position is not liable for debts contracted by her without his previous authority or subsequent sanction (*l*). And where he has expressly forbidden her to contract debts, this prohibition will negative the inference that the husband had held out that the wife had authority to bind him (*m*). The question as to whether a husband is liable for money lent to his wife for the purchase of necessaries, in cases where he would be undoubtedly liable for the necessaries themselves, is a debateable one, though on the whole the better opinion seems to be that a wife is not the agent of her husband in such cases (*n*).

Cases where wife has goods supplied during temporary absence of husband.

Where a husband is not separated from his wife, but during a temporary absence makes an allowance to her for the supply of herself and family with necessaries, he is not liable to a tradesman who, with knowledge of this fact, supplies her with goods (*o*). Also, when a tradesman, knowing the wife to be a married woman, gave credit to her and not to the husband, it was held that the husband was not liable (*p*).

Effect of creditor electing to sue wife.

And if a creditor elects to sue a wife, living with her husband, in respect of a claim for household necessaries, and recovers

(*l*) *Seaton v. Benedict* (1828), 5 Bing. 28; 2 Sm. L. C. 11th ed., 482.

(*m*) *Jolly v. Rees* (1864), 15 C. B., N. S. 628, approved in *Debenham v. Mellon* (1880), 6 App. Cas. 24.

(*n*) *Knox v. Bushell* (1857), 3

C. B., N. S. 334; *Wood, In re, Davidson v. Wood* (1863), 8 L. T. 476.

(*o*) *Holt v. Brien* (1821), 4 B. & Ald. 252.

(*p*) *Bentley v. Griffin* (1814), 5 Taunt. 356.

judgment against her, he must abide by such election, and cannot subsequently proceed against her husband for the same debt, the whole cause of action in cases of alternative liability being exhausted by the recovery of a judgment against one of the parties (g). Chap. III. s. 3.

Where the wife of an officer resides in England, and her husband is abroad on service, she is not to be considered as living separate from her husband (r).

It may perhaps be not out of place to observe here, that as a general rule it is the duty of a wife to reside with her husband wherever he wishes; and consequently, it has been held that a condition attached to a legacy, that the legatee (a married woman) should reside in a place different from that where her husband wished her to reside, is void (s). A husband may not, however, resort to physical restraint in order to enforce restitution of conjugal rights (t); although an action, sounding in exemplary damages, will lie against any one enticing a wife away from her husband (u).

Wife bound to reside where husband wishes.

A man is liable for the debts of the woman with whom he cohabits, if he holds her out to the world as his wife (x). And where a man, who had for some years so cohabited with a woman who had passed as his wife, went abroad, it was held that she might have the same authority to bind him by her contracts for necessities as if she had been his wife, but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received (y). Such liability will continue even after the cohabitation has ceased, unless the parties supplying goods have been informed of the separation (z), the general principle

Where woman held out as wife.

(g) *Morel v. Westmoreland* (Earl of), (1904) A. C. 11.

(r) *Dennys v. Surgeant* (1834), 6 Car. & P. 419.

(s) *Wilkinson v. Wilkinson* (1871), L. R., 12 Eq. 604.

(t) *Reg. v. Jackson*, (1891) 1 Q. B. 671, C. A.

(u) *Smith v. Kaye* (1904), 20 T. L. R. 261.

(x) *Watson v. Thirlkeld* (1794), 2 Esp. 637; *Robinson v. Nahon* (1808), 1 Campb. 245.

(y) *Blades v. Free* (1829), 9 B. & C. 167; *Smout v. Ilbery* (1842), 10 M. & W. 1.

(z) *Ryan v. Sams* (1848), 12 Q. B. 460; *Munro v. De Chemant* (1815), 4 Campb. 215.

Chap. III. s. 3. governing liability in such cases not being based upon the marital relationship existing between the parties, but upon that rule of law which makes a principal responsible for the acts of his agent.

What are
necessaries.

Necessaries have been held to include not only the means of living in accordance with the husband's position, but also the expenses of exhibiting articles of the peace against a husband who had violently threatened his wife (*a*); but expenses incurred in indicting a husband were not considered to be necessaries (*b*). Amongst necessaries, the cost of which can be recovered from the husband, are expenses incidental to a suit for the restitution of conjugal rights, or for proceedings for a divorce or a judicial separation, where they are in fact necessary for the protection of the wife (*c*); but care must be taken that the suit is reasonably and rightly instituted (*d*). Legal advice, on domestic matters of a pressing nature, and as to the effect of an ante-nuptial settlement, have also been held necessaries for which a husband is liable (*e*). Where a decree is made upon a husband's petition for divorce, he must pay all the costs properly incurred by his wife in her defence (*f*). A solicitor employed by a wife to obtain a divorce may sue the husband for costs reasonably incurred beyond those allowed on taxation, for the common law right is not limited by the statutory right (*g*).

Acts of 1882
and 1893.

The Married Women's Property Acts, 1882 and 1893, do not seem to have affected the liability of the husband for contracts made by his wife as his agent, or by his authority; but the Acts have conferred upon a married woman the capacity of entering into and rendering herself liable on any contract to

(*a*) *Shepherd v. Mackoul* (1813), 3 Campb. 326; *Turner v. Rookes* (1839), 10 Ad. & Ell. 47.

(*b*) *Grindell v. Godmond* (1836), 5 Ad. & Ell. 755.

(*c*) *Brown v. Ackroyd* (1856), 5 E. & B. 819; *Rice v. Shepherd* (1862), 12 C. B., N. S. 332.

(*d*) *Wingfield and Blew, In re*, (1904) 2 Ch. 665; *Re Hooper* (1864), 33 L. J., Ch. 300; *Taylor v. Hail-*

stone (1883), 52 L. J., Q. B. 101.

(*e*) *Wilson v. Ford* (1868), L. R., 3 Ex. 63.

(*f*) *Robertson v. Robertson* (1882), 51 L. J., P. D. & A. 5; and see *Smith v. Smith* (1882), 51 L. J., P. D. & A. 31.

(*g*) *Ottaway v. Hamilton* (1878), 3 C. P. D. 393; 47 L. J., C. P. 424; *Stocken v. Pattrick* (1873), 29 L. T. 507.

the extent of her separate property. They also provide that she may be sued on such contracts as a *feme sole*; that damages or costs recovered against her shall be payable out of her separate property (*h*) (including, so far as costs are concerned, property subject to a restraint on anticipation (*i*)), that every contract entered into by her shall be deemed to be entered into with respect to and to bind her separate property, unless the contrary be shown (*k*), and that such contracts shall bind all after-acquired separate property (*l*). The word "contract" includes trusts, and the offices of executrix and administratrix (*m*).

The separate estate of a married woman could always be rendered liable to answer her general engagements made with reference to that property (*n*); but it was necessary to show that she intended to contract so as to make herself, that is, her separate property, the debtor (*o*).

The changes effected by the Act of 1882 are important, for the onus is now on the married woman to displace the presumption that she intended in entering into a contract to bind her separate property, and this presumption is enhanced by the Married Women's Property Act, 1893; she can, of course, do so by showing that she entered into the contract as the agent or by the authority of her husband, express or implied; and if she has that authority, the fact that she has separate property cannot relieve him from liability on contracts so made by her.

Onus under Act on wife to displace presumption that she intended to bind her separate property.

The property of a married woman liable to satisfy her contracts has been increased. Formerly she could not render after-acquired property liable (*p*); the Acts of 1882 and 1893, however, make all property which may at any time belong to her liable for her contracts, although by these statutes no property subject to a restraint on anticipation can be reached (*q*),

(*h*) Sect. 1, sub-sect. 2.

(*i*) *Crickitt v. Crickitt*, (1902) P. 177, C. A.

(*k*) 56 & 57 Vict. c. 63, s. 1 (a).

(*l*) 56 & 57 Vict. c. 63, s. 1 (b).

(*m*) Sect. 24.

(*n*) *Johnson v. Gallagher* (1862), 3 De G., F. & J. 494. See on this

subject, *post*, Chap. XI., sect. 2.

(*o*) *London Chartered Bank v. Lemprière* (1873), L. R., 4 P. C. 572, 597.

(*p*) *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454; 50 L. J., Ch. 394.

(*q*) *Beckett v. Tasker* (1887), 19 Q. B. D. 7; *Pelton v. Harrison*,

Chap. III. s. 3. unless, under the Conveyancing Act, 1881 (*r*), the Court, where it appears to be for her benefit, by judgment or order, with her consent, binds her interest in any property; and the Court, as a general rule, will not make any such order except for the purpose of facilitating alienation as distinguished from anticipation.

Court can remove restraint on anticipation.

A mere increase of income has been held, by the Court of Appeal, not to be a sufficient "benefit" to justify a removal of restraint (*s*).

Costs of litigation.

In case of the costs of litigation, it is now enacted by sect. 2 of the Married Women's Property Act, 1893 (*t*), that "In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise, as may be just."

What property will be bound.

The separate property which is made liable under the Married Women's Property Acts includes all property held to the separate use of a married woman without restraint on anticipation, whether held for her by trustees or belonging to or acquired by her under the provisions of the Act of 1882; but judgment must be obtained against the property before she can be restrained from dealing with it (*u*). It will also include property appointed by her by will in execution of a general power (*x*): for although it was settled law, that where the power was to be exercised by deed or will the *corpus* of the property, if appointed by will, became subject to her debts and engagements, there was some doubt whether, where the power was to

(1891) 2 Q. B. 422; *Re Warren's Settlement*, W. N. 1883, 125; and see *Hodges v. Hodges* (1882), 20 Ch. D. 749.

(*r*) 44 & 45 Vict. c. 41, s. 39.

(*s*) *Blundell, In re*, (1901) 2 Ch. 221, C. A.

(*t*) 56 & 57 Vict. c. 63, altering the law as laid down by the Court of Appeal in *Cox v. Barnett*, (1891) 1 Ch. 617.

(*u*) *Robinson v. Pickering* (1881), 16 Ch. D. 660.

(*x*) 45 & 46 Vict. c. 75, s. 4.

be exercised by will alone, the effect was the same (*y*) ; but now Chap. III. s. 3.
property, whether the power be to appoint by deed or will, or
by will alone, is, if actually appointed by will, equally subject
to all the engagements of a married woman.

A husband is not liable on a promissory note made by his Husband not
liable on
promissory
note made by
wife unless
as his agent.
wife in his name without his authority ; and evidence that the
proceeds of such note were applied in discharge of the husband's
debt is not sufficient to prove his authority (*z*). The wife may,
however, be her husband's agent, with his assent, to accept
and indorse bills even in her own name for him (*a*). Pay-
ment of interest by a wife on a promissory note, made by her
when a *feme sole*, is no evidence of a promise to pay by the
husband (*b*).

By the Bills of Exchange Act, 1882 (*c*), capacity to incur Bills of Ex-
change Act,
1882.
liability as a party to a bill of exchange is co-extensive with
capacity to contract, so that a married woman can incur liability
as a party to bills and promissory notes, and they will, like
other contracts, bind her separate property, without any express
reference being made to it ; nor is any order of the Court to
that effect now necessary (*d*).

A married woman could always be appointed an administra- Authority of
married
woman to be
executrix or
administra-
trix.
trix or executrix ; it was, however, generally considered that
she could not take probate or administer without the consent
of her husband, although it has not been the practice to require
proof of that consent (*e*). Payment to a married woman execu-
trix of a debt due to her testator is a valid payment, even
though her husband has refused to allow her to act (*f*) ; and
a *feme covert* executrix could by will appoint an executor, so as
to continue the chain of representation (*g*).

(*y*) *London Chartered Bank of Australia v. Lemprière* (1873), 4 (b) *Neve v. Hollands* (1852), 16
Jur. 933.
P. C. 572.

(*z*) *Goldstone v. Tovey* (1838), 6 (c) 45 & 46 Vict. c. 61, s. 22.
Scott, 394. As to whether a hus- (d) *Barber v. Gregson* (1880), 49
L. J., Q. B. 731.
band is liable for money lent to his (e) *Clerke v. Clerke* (1881), 6 P. D.
103.
wife for the purchase of necessaries, (f) *Pemberton v. Chapman* (1858),
Ell. Bl. & Ell. 1056.
see *ante*, p. 100.

(*a*) *Lindus v. Bradwell* (1848), 5 (g) *Scammell v. Wilkinson* (1802),
2 East, 552.
C. B. 583.

Chap. III. s. 3.

Husband not
liable in such
case.

The Act of 1882 enacts, that a married woman who is an executrix, administratrix or trustee, may sue and be sued, and may do all acts relating to the property so vested in her as though she were a *feme sole* (h). Henceforth, therefore, a married woman may accept the offices of trustee, executrix and administratrix without the consent or authority of her husband; he will no longer incur any liability in consequence of her so doing, and he cannot be required to join in the administration bond (i). And since the passing of this Act, when a married woman, with others, advances moneys belonging to a joint account by way of mortgage, it is not necessary, upon a transfer of the mortgage, for her husband to concur with her in the conveyance (k).

But a married woman, who is a trustee of real estate for sale, cannot convey to a purchaser except with the concurrence of her husband (l).

(h) 45 & 46 Vict. c. 75, s. 18.

(i) *In the Goods of Harriet Ayres* (1883), 8 P. D. 168.

(k) *West and Hardy's Contract*, *In re*, (1904) 1 Ch. 145.

(l) *Harkness and Allsopp's Contract, In re*, (1896) 2 Ch. 358. A

Bill is now before Parliament to remove this disability.

SECTION IV.

LIABILITY FOR THE CONTRACTS OF THE WIFE DURING
SEPARATION (*m*).

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From the last section it will have been collected that when the wife resides with her husband, and when the act is done by her as his agent in the ordinary course of and as part of domestic administration, there is a *primâ facie* presumption of her authority to bind him, which may be rebutted by contrary evidence. But when the wife is living apart from her husband, the presumption changes sides, and the *onus probandi* is thrown on the party alleging the authority (*n*); for the law casts upon married persons the duty of cohabitation; and a husband is not bound to support a wife who, without just cause, refuses to

(*m*) The separation here referred to does not include cases in which there has been a decree for judicial separation.

(*n*) *Mainwaring v. Leslie* (1826), 1 Mood. & Malk. 18; *Edwards v. Towels* (1843), 5 M. & G. 624; *Johnston v. Sumner* (1858), 27 L. J., Ex. 341.

Chap. III. s. 4. cohabit with him (o). *Primâ facie*, therefore, a woman living apart from her husband has no authority to bind him (p).

Wife *primâ facie* without authority.

The separation must be justified.

In order to fasten liability upon the husband, therefore, the separation must be justified. Thus, it was laid down by Lord Tenterden, that "when the wife is not living with her husband, there is no presumption that she has authority to bind him even for necessities suitable to her degree in life. It is for the plaintiff to show that under the circumstances of the separation, or from the conduct of the husband, she had such authority. The mischief of allowing the ordering of goods by a married woman living apart from her husband to be *primâ facie* evidence, so as to charge him for them, would be incalculable" (q). Hence "it is for the plaintiff to show that she (the wife, when absent from her husband) was absent from some cause which would justify her absence" (r). In *Clifford v. Laton*, the same judge said: "When a wife lives with her husband, he may in general be taken to be cognizant of her contracts; but when they are living separate, it is for the party seeking to charge the husband to make out by proof that he is liable. If a shopkeeper will sell goods to every one who comes into his shop, without inquiry into their circumstances, he takes his chance of getting paid, and it lies on him to make out, by full proof, his claim against any other person" (s). And, again, in the same case it was said that it is the duty of tradesmen to inquire into the circumstances of the separation, before they part with their goods; the onus lying on them to prove that the circumstances are such as will entitle them to recover against the husband (t).

The general presumption, therefore, is against the wife's authority, and that presumption, every plaintiff suing a husband under such circumstances must displace, by showing that the wife's separation has arisen from no fault on her part (u); and

(o) *Etherington v. Parrott* (1704), 2 Lord Raym. 1006.

(p) *Hindley v. Westmeath* (*Marquis of*), 30 R. R. 290.

(q) *Mainwaring v. Leslie* (1826), 1 Mood. & Malk. 18; and see Selw. N. P., Bar. & Fem. 1; *Montague v.*

Benedict (1825), 3 Barn. & Cr. 631.

(r) *Mainwaring v. Leslie* (1826), 2 Car. & P. 507.

(s) *Clifford v. Laton* (1821), 1 Mood. & Malk. 101.

(t) (1821), Car. & P. 15, 16.

(u) This proposition is stated in

it seems that now, since the Acts of 1882 and 1893, it must also be shown that the contract was not entered into by the wife with respect to her separate property (*x*). Where the action is brought against the wife, she must now, in order to displace her liability, show not only that the circumstances of the case justified her in pledging her husband's credit, but also that the contract was not entered into by her with respect to her separate property (*y*). In the absence of such proof, it would seem that, since the passing of the Married Women's Property Acts, a married woman possessing separate property, and living apart from her husband, has no authority to render her husband liable for necessities supplied to her. And *a fortiori*, a husband is not responsible for goods ordered by his wife to be sent to a third person (*z*).

The wife goes forth to the world with an implied credit for necessities (1) where she has been deserted by her husband (*a*); (2) where her husband has turned her out of doors (*b*); (3) where her husband's misconduct has compelled her to leave him (*c*). Thus, if a wife quit her husband's house under a reasonable apprehension of personal violence, *that* will be equivalent to his turning her out of doors. But a mere expression on the part of a husband, during the heat of a quarrel, that his wife may go where she likes and do what she likes, is no justification for a wife leaving her husband and refusing to return to him (*d*). And under all circumstances the nature of the threat which would justify a wife in refusing to return to her husband ought to be explained to the jury (*e*). If a woman

Chap. III. s. 4.

How separation may be justified.

this form advisedly, because, whatever logicians may say, it is the constant practice to prove *negatives* in Courts of Justice.

(*x*) 45 & 46 Vict. c. 75; and 56 & 57 Vict. c. 63.

(*y*) See *Johnson v. Gallagher* (1862), 3 De G., F. & J. 494.

(*z*) *Reeve v. Conyngham* (1847), 2 Car. & K. 444.

(*a*) As to what amounts to desertion, see *post*, p. 185.

(*b*) *Hunt v. De Blaquiére* (1829), 5 Bing. 550, 557; *Debenham v. Mellon* (1880), 5 Q. B. D. 394; *Forrestall v. Lawson* (1876), 34 L. T. 903.

(*c*) *Jewsbury v. Newbold* (1857), 26 L. J., Ex. 247; *Baker v. Sampson* (1863), 14 C. B., N. S. 383.

(*d*) *Chaster v. Chaster* (1901), 84 L. T. 272.

(*e*) *Biffin v. Bignell* (1862), 31 L. J., Ex. 189.

Chap. III. s. 4. marry a drunkard, with knowledge of his infirmity, such premarital knowledge does not necessarily compel her to endure everything that may result from the continuance of his drunken habits (*f*); and if she quit because her husband has brought a common woman to reside in the house, *that* is also a sufficient reason for her going; and it is no defence to an action for necessities supplied to her under such circumstances, that she has committed adultery previously to the credit being given, if the husband did not know of it till *after*, nor that after the credit she obtained a decree for *alimony*, which alimony was to relate back to a period before the credit (*g*). Under ordinary circumstances a wife's right to assume her husband's assent to her contracts continues only so long as she lives a chaste life; where, however, a wife committed adultery with the connivance of her husband, and he subsequently turned her out of doors, it was held by the Court of Appeal that the husband was liable for necessities (*h*). And a similar rule applies if a husband condones his wife's adultery and subsequently turns her away (*i*).

Where the separation has taken place by mutual consent, the husband's obligation to maintain the wife continues, unless he shows that she is sufficiently provided for (*k*); and it is immaterial whether that provision is derived from the wife's separate property, or from the allowance of the husband, or partly from one source and partly from the other (*l*). In such a case, if the wife makes terms as to the income to be allowed to her, and that income proves insufficient, she has no authority to pledge her husband's credit. Presumption of cohabitation, however, avoids such an agreement, and an enhanced sum may be

(*f*) *Walker v. Walker* (1898), 77 L. T. 715.

(*g*) *Houlston v. Smyth* (1825), 2 Car. & Pay. 22, where the case of *Horwood v. Heffer* (1811), 3 Taunt. 421, was repudiated.

(*h*) *Wilson v. Glossop* (1888), 20 Q. B. D. 354; *Burdon v. Burdon*, (1901) P. 52.

(*i*) *Harris v. Morris* (1801), 2 R. R. 786.

(*k*) *Liddlow v. Wilmot* (1817), 2 Stark. 86; *Thompson v. Harvey* (1768), 4 Burr. 2178; *Dixon v. Hurrell* (1838), 8 Car. & Pay. 717; *Johnston v. Sumner* (1858), 27 L. J., Ex. 341.

(*l*) *Eastland v. Burchell* (1878), 3 Q. B. D. 433.

decreed by the Court as alimony upon a subsequent judicial separation (*m*). Chap. III. s. 4.

Where, however, a wife has left her husband, not by mutual consent, but upon grounds sufficient to justify her doing so, a simple request on his part that she will return to him does not of itself determine his liability for necessities supplied to her during the separation (*n*). And it is clear that if he only offers to take her back upon conditions which are improper, his liability continues (*o*). Husband's request that she will return.

What circumstances will entitle a husband to require his wife's return, and when her refusal will put an end to his liability, were thus stated by Mr. Baron Garrow in *Reed v. Moore* (*p*):— When such request will determine husband's liability.

“If a husband drives his wife from him by his misconduct, and sends her forth with an implied credit arising from their relative situation, it is his duty by some positive act to determine that liability. If his wife subsequently returns, his liability is at an end. But in default of any amicable arrangement, he must go to the Spiritual Court, and there obtain a decree for the purpose. And until some such unequivocal act is done, a person making a claim in a Court of law for necessities supplied to the wife is entitled to recover against the husband.”

Where a husband living apart from his wife allows her enough for her maintenance, he is not liable for necessities supplied to her, and notice to the tradesmen of that allowance is unnecessary, because, if they inquire into the circumstances of her separation, they will find that she is not in a situation to charge her husband; and if they do not choose to inquire, they trust her at their peril (*q*). Nor will the fact that the allowance is inadequate make the husband liable (*r*). Where husband allows her a sufficient maintenance.

A mere notice by the husband that he will not pay for goods supplied to his wife will avail nothing, if under the circum- Effect of a notice to tradesmen.

(*m*) *Negus v. Forster* (1882), 46 L. T. 675. As to what constitutes a resumption of cohabitation, see *Rowell v. Rowell*, (1900) 1 Q. B. 9, C. A.

(*n*) *Emery v. Emery* (1827), 1 You. & Jer. 501.

(*o*) *Reed v. Moore* (1832), 5 Car. & Pay. 200.

(*p*) *Ibid.*

(*q*) *Mizen v. Pick* (1838), 3 Mees. & Wel. 481; *Emmett v. Norton* (1838), 8 Car. & Pay. 506; *Hindley v. Marquess of Westmeath* (1827), 6 Barn. & Cres. 200; *Johnston v. Sumner* (1858), 27 L. J., Ex. 341.

(*r*) *Biffin v. Bignell* (1862), 6 L. T. 248; *Eastland v. Burchell* (1878), 38 L. T. 563.

Chap. III. s. 4. stances of the separation he is liable (*s*). Accordingly, in such a case the common practice of advertising in the newspapers, resorted to by husbands with the view of evading liability for the acts of their wives, is of no efficacy.

But if while husband and wife are separate, they both deal with the same tradesman, and he specially agree with the husband not to charge him for goods to be supplied to the wife, he will be bound by such special agreement, and cannot afterwards come upon the husband (*t*).

In *Johnston v. Sumner* (*u*), it was held by the Court of Exchequer, that where husband and wife separate by mutual consent and an agreed allowance is paid to her, the husband will not be liable even for necessities supplied to her without his knowledge, and the question of the adequacy of the allowance is not for the jury; and also that in all cases where the wife is living apart from the husband, it is for the plaintiff to show facts whence an authority to pledge his credit is to be inferred.

Advances to a wife deserted by her husband can be recovered.

A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has actually been applied towards, her support upon an emergency, is entitled to stand in the place of the person who supplied the necessities, and to recover from her husband the sums so advanced; if, however, she has separate estate, money so advanced binds that estate (*x*).

Where maintenance unpaid.

The allowance made by the husband to the wife must be paid (*y*), or he will be held liable for necessities supplied to her; so also a decree for alimony, unless the alimony be paid, does not free him from his liability (*z*); and a wife, where there is default in payment of the separate maintenance, secured to her by deed, is not confined to her remedy on the covenant, but

(*s*) *Dixon v. Hurrell* (1838), 8 Car. & Pay. 717.

(*t*) *Dixon v. Hurrell* (1838), *ubi supra*.

(*u*) (1858), 3 H. & N. 261.

(*x*) *Deare v. Soutten* (1869), L. R., 9 Eq. 151; *Jenner v. Morris* (1860), 29 L. J., Ch. 923.

(*y*) *Ozard v. Darnford* (1780), S. N. P., 13th ed., 229.

(*z*) *Hunt v. De Blaquiére* (1829), 5 Bing. 550. See also *Marshall v. Rutton* (1800), 8 T. R. 545, and *Murray v. Barlee* (1834), 3 Myl. & K. 209, 220.

may bind her husband by contracting for necessities (a). And Chap. III. s. 4. where there has been a default in payment of an agreed allowance, a subsequent resumption of cohabitation is not such an accord and satisfaction as will relieve a husband from his liability for arrears of allowance actually accrued prior to such resumption (b).

The estate of a lunatic has been held to be liable for necessities supplied to his wife, who had no sufficient allowance (c); but in a case where the wife received all her husband's income while he was a lunatic, he was held not liable for necessary repairs done to his house by her order (d). Wife of lunatic can pledge his credit.

In *Drew v. Nunn* (e), a husband, who having held out his wife as having authority to pledge his credit, became insane, was held liable after recovery for goods supplied to her during his insanity, by a person who was unaware of the husband's insanity, on the ground that, although in the opinion of the Court insanity puts an end to the agent's authority, the defendant by holding out his wife as agent had entered into a contract with the plaintiff that she had authority to act upon his behalf, and that, until the plaintiff had notice that this authority was revoked, he was entitled to act upon the defendant's representations.

The decision in this case, although unexceptionable on the ground of expediency, presents certain difficulties on the score of legality. It is perfectly true, upon the authority of the earlier case of *Smout v. Ilbery* (f), that when neither agent nor third party have any possible means of ascertaining that the authority of the agent to contract on behalf of his principal has been revoked by the act of God, the agency continues until the knowledge of such revocation has been communicated to either the agent or the third party. But in this case the insanity of the principal, which constituted a revocation of the agency, was perfectly well known to the agent, although unknown to the

(a) *Nurse v. Craig* (1806), 2 B. L. J., Ch. 400; *Read v. Legard* & P. N. B. 148. (1851), 20 L. J., Ex. 309.

(b) *Macan v. Macan* (1900), 70 L. J., Q. B. 90. (d) *Richardson v. Dubois* (1869), L. R., 5 Q. B. 51.

(c) *Davidson v. Wood* (1863), 32 (e) (1879), 4 Q. B. D. 661.

(f) (1842), 10 M. & W. 1.

Chap. III. s. 4. third party, who appears to have made no attempt to ascertain the true facts of the case. Consequently the rule laid down by the Court of Exchequer in *Smout v. Ilbery*, being based upon totally different facts, cannot logically be held to apply (g). It may be that the exigency of the circumstances in *Drew v. Nunn*, and the undoubted *bona fides* of the parties, led the Court of Appeal, in the interests of justice, to condone what appears, upon the face of it, to be a manifest illegality.

Wife deserted by husband can pledge his credit for necessities supplied to child.

In a case where the wife was living with her child, aged seven, separate from her husband (the father of the child), for reasons which justified her in so doing, it was held by the Court of Queen's Bench (Blackburn, Mellor, Lush, JJ., Cockburn, C. J., diss.) that, as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit (h), and a person who advances money to a deserted wife for necessities can recover it from the husband (i).

It may be incidentally mentioned here that a married woman, living apart from her husband, cannot obtain an order in bastardy against the putative father of her illegitimate child born before the marriage (k).

For legal expenses in certain instances.

The legal expenses incurred by a deserted wife—(1) Preliminary and incidental to a suit of conjugal rights; (2) Obtaining counsel's opinion on the effect of an ante-nuptial settlement; (3) In obtaining professional advice as to the proper mode of dealing with tradespeople who are pressing her to pay them for various necessary articles supplied to her since she had been deserted, and also of preventing a distress threatened on her

(g) The principle of *Smout v. Ilbery* applies to a revocation of authority by the dissolution of a company as well as by the death of an individual: *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43. As to when there is an implied revocation, see *Chapleo v. Brunswick Building Society* (1881), 6 Q. B. D. 696.

(h) *Bazeley v. Forder* (1868), L. R., 3 Q. B. 559; 37 L. J., Q. B. 237; but see *Hodges v. Hodges*, 1 Esp. 441; 4 R. R. 889.

(i) *Deare v. Soutten* (1869), L. R., 9 Eq. 151; *Jenner v. Morris* (1861), 3 De G., F. & J. 45.

(k) *Peatfield v. Childs* (1899), 63 J. P. 117.

furniture—are necessities for which she has implied authority to pledge her husband's credit during his lifetime, and for which after his death his executors are liable (*l*). The costs, however, of a solicitor employed by a married woman to institute proceedings on her behalf for a judicial separation are not necessities for which the husband is liable, unless there was great probability of ultimate success (*m*). And the same rule applies in the case of a petition for a dissolution of marriage (*n*). Chap. III. s. 4.

Where the wife dies when living apart from her husband, and is buried by the person in whose house she dies, in a manner suitable to her rank, the husband is liable for the funeral expenses incurred (*o*). But a husband, executor of his wife's will, made under a testamentary power of appointment, is entitled (even if the estate be insolvent) to retain out of her property the expenses of her funeral (*p*). Husband's liability to stranger for wife's funeral expenses.

The wife's adultery puts an end to her authority to bind her husband for any debts which she may contract (*q*), and if she is living apart from him, relieves him from any liability under 31 & 32 Vict. c. 122 (*r*), to maintain her (*s*); but if he condones or connives at the adultery, then his liability revives (*t*). Adultery of wife relieves husband from liability.

Where a husband, in an action brought against him for necessities supplied to his wife whilst living apart from him, relies for defence upon the adultery of the wife, it is not sufficient to prove that a jury found her guilty of adultery, but the decree of the Divorce Court itself must be put in evidence; since where there is no judgment of the Divorce Court altering

(*l*) *Wilson v. Ford* (1868), L. R., 3 Ex. 63.

(*m*) *Re Hooper* (1864), 33 L. J., Ch. 300; *Browne v. Ackroyd* (1856), 5 E. & B. 819; *Turner v. Rookes* (1839), 10 Ad. & E. 47; *Beale v. Arabin* (1877), 36 L. T., N. S. 249.

(*n*) *Townson v. Townson* (1898), 78 L. T. 54; *Waudby v. Waudby* (1901), 84 L. T. 829, C. A.

(*o*) *Bradshaw v. Beard* (1862), 31 L. J., C. P. 273; 12 C. B., N. S. 344.

(*p*) *M'Myn, In re* (1886), 33 Ch. D. 575.

(*q*) *Morris v. Martin* (1725), 1 Str. 647; *Mainwaring v. Sands* (1726), 2 Str. 706; *Emmett v. Norton* (1838), 8 Car. & Pay. 506.

(*r*) The Poor Law Amendment Act, 1868.

(*s*) *Culley v. Charman* (1881), 7 Q. B. D. 89.

(*t*) *Cooper v. Lloyd* (1859), 6 C. B., N. S. 519.

Chap. III. s. 4. the status of the parties, the proceedings therein would afford no defence to an action (*u*).

Position of wife of felon. A wife could always contract as a *feme sole* so as to bind herself, and sue or be sued, if her husband had been transported for felony (*x*).

Husband cannot recover savings out of wife's separate maintenance. Although savings out of money, given by the husband to the wife for household purposes when they are living together, are the property of the husband, yet, when a husband makes an allowance to a wife who is living separate from him with his consent, he cannot recover back any savings she may make out of such allowance (*y*).

It has, however, been held, in one case of doubtful application at the present day, that a wife's savings, from an allowance made to her by her husband for the purchase of necessaries, may be recovered by him from a third party to whom the wife had given them a few days before her death (*z*).

(*u*) *Needham v. Bremner* (1866), L. R., 1 C. P. 583.

(*x*) *Carrol v. Blencow* (1801), 4 Esp. 27; Stephen's *Blackstone* (4th ed.) v. II. 279; *Exp. Franks* (1831), 7 Bing. 762. Penal servitude is now substituted for transportation. Where the husband is an alien, see *Kay v. Duchess of Piennes* (1811), 3 Camp. 123; where the husband is an alien enemy, see

Barden v. Keverberg (1836), 2 M. & W. 61; *De Wahl v. Braune* (1856), 1 H. & N. 178.

(*y*) *Brooke v. Brooke* (1858), 25 Beav. 342; see also *Barrack v. McCulloch* (1856), 3 Kay & J. 110; *Johnson v. Gallagher* (1862), 3 De G., F. & J. 494.

(*z*) *Messenger v. Clarke* (1850), 5 Ex. 388.

CHAPTER IV.

RIGHTS ARISING FROM THE DISSOLUTION OF
THE MARRIAGE BY THE HUSBAND'S DEATH.

SECTION I.

THE HUSBAND'S PERSONALTY—RIGHTS OF RELICT.

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THE dissolution of the marriage may be by the death of the husband; or by the death of the wife; or by divorce. Each, therefore, of these contingencies we will consider in their order.

If the dissolution of the marriage is occasioned by the death of the husband, and if he dies intestate, the widow is usually, unless she renounce, appointed his sole administratrix. Widow generally selected to administer.

This right she is entitled to under the statute 21 Hen. 8, c. 5, s. 3, which enacts that the ordinary shall grant administration "to the widow or next of kin or to both" at his discretion (a). Her right under the statute 21 Hen. 8, c. 5, s. 3.

Notwithstanding the words of this statute a joint grant to a next of kin and to a person entitled in distribution by representation to a deceased next of kin has, under special circumstances, with the consent of the next of kin, been made under

(a) Williams on Exors., 10th edit., p. 325 *et seq.*, on the widow's right to administration. In *the Goods of Browning* (1861), 2 Sw. & Tr. 634.

Chap. IV. s. 1. the 73rd section of the Court of Probate Act, 1857 (*b*). But this was not at one time the usual practice (*c*).

Land Transfer Act, 1897. It is, however, now provided by the Land Transfer Act, 1897 (*d*), that "where a person dies possessed of real estate, the Court shall, on granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by Rules of Court (*e*) for adapting the procedure and practice in the grant of letters of administration to the case of real estate" (*f*). This Act does not, however, apply to copyhold land (*g*).

The Court prefers a sole to a joint administration.

As a rule the Court prefers a sole to a joint administration, and never forces a joint one (*h*). In modern practice the election of the Court is in favour of the widow (*i*), and she is never set aside except upon good cause being shown (*k*).

Cases where claim of widow is disallowed.

The Court has disallowed the claim of the widow in the following instances:—

1. When she has barred herself of all interest in her husband's personal estate by her marriage settlement (*l*).
2. When she is a lunatic (*m*).
3. When she has eloped from her husband or cohabited in his lifetime with another man (*n*).
4. When she has lived separate from her husband (*o*).

(*b*) 20 & 21 Vict. c. 77; and *In the Goods of Grundy* (1868), L. R., 1 P. & D. 459.

(*c*) See *In the Goods of Browning* (1861), 2 Sw. & Tr. 634.

(*d*) 60 & 61 Vict. c. 65, Part I., sect. 2, sub-s. 4.

(*e*) Rules have been made under this Act.

(*f*) See *Barnett, In the Goods of*, (1898) P. 145.

(*g*) *S. C.*, at p. 146.

(*h*) *In the Goods of Newbold* (1866), L. R., 1 P. & D. 285.

(*i*) *Goddard v. Goddard* (1821),

3 Phillimore, 637; *Atkinson v. Barnard* (1815), 2 Phillimore, 316.

(*k*) *In the Goods of Anderson* (1864), 3 Sw. & Tr. 489.

(*l*) *Walker v. Carless*, 2 Cas. temp. Lee, 560.

(*m*) *In the Goods of Williams* (1830), 3 Hag. (Ec.) 217; *Alford v. Alford*, Dea. & Sw. 322.

(*n*) *Fleming v. Pelham* (1807), 3 Hag. (Ec.) 217, n. (*b*); *Conyers v. Kitson* (1831), 3 Hag. 556.

(*o*) *Lambell v. Lambell* (1831), 3 Hag. 568; *Chappell v. Chappell* (1843), 3 Curt. 429.

The circumstance of the widow having married again is not a valid objection (*p*). Chap. IV. s. 1.

A wife divorced for adultery forfeits her right to administer to her husband's effects (*q*). The right of the heir-at-law under the provisions of the Land Transfer Act, 1897, may also influence the Court when granting letters of administration.

When the husband dies intestate, leaving a widow and child, or children, or representatives by direct descent of such child or children, his widow, by the Statute of Distributions, is entitled to *one-third* of his personal estate (*r*). Her distributive share when there is a child.

The phrase "Thirds of personal estate at common law," though formerly found in legal agreements, deeds and formal documents, seems void of meaning. There is now no distribution of intestates' personal estates by the common law; and the phrase is still more incorrect if used to express the interest which the widow takes under the statute (*s*).

When the husband dies intestate, leaving a widow only, such widow is, by virtue of the Intestates' Estates Act, 1890 (*t*), which applies to England and Ireland, entitled— When there is no child. Intestates' Estates Act, 1890.

- (1) To the whole of the intestate's estate (whether consisting of realty or of personalty, or of both) when such estate does not exceed 500*l.* in value.
- (2) Where the estate exceeds 500*l.* in value the widow has a charge on the whole of such real and personal estate for 500*l.*

Such provision being in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after the payment of the 500*l.*, in the same way as if such residue had been the whole of such intestate's real and personal estates, and the Intestates' Estates Act, 1890, had not been passed.

A widow is now, therefore, entitled to a *moiety* or *half* of the personal estate of her husband under the Statute of Distribu-

(*p*) *Webb v. Needham* (1823), 1 Add. 494.

(*q*) *Pettifer v. James* (1717), Bunbury, 16; *In the Goods of Davis* (1840), 2 Curt. 628.

(*r*) 22 & 23 Car. 2, stat. 2, c. 10, s. 6; 2 Black. Com. 515, 516.

(*s*) *Gurly v. Gurly* (1842), 8 Cl. & Fin. 743. In this case Lord

Cottenham asked: "What is the correct meaning of the expression, 'Thirds of personal estate at common law'?" To which Mr. Pemberton Leigh answered: "It has no meaning. And it does not correctly express the interest the widow would take under the Statute of Distributions."

(*t*) 53 & 54 Vict. c. 29.

Chap. IV. s. 1. tions, *plus* 500*l.* as provided by sect. 2 of the Intestates' Estates Act.

Apparently, however, the statutory rights of the widow under the above Acts may be absolutely barred by a provision under a marriage settlement in discharge of all claims by her on the estate and effects of her husband (*u*).

When there
are no next
of kin.

When the husband dies intestate, leaving a widow, but (as in the case of a bastard) no next of kin, the widow, apart from express legislation, is not entitled to the whole of his personal estate; but one *moiety* or *half* belongs to her, and the other moiety or half goes to the Crown (*x*).

SECTION II.

THE WIDOW'S PARAPHERNALIA.

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It is probable that since the recent legislation questions as to paraphernalia will seldom arise; as, now that a husband can

(*u*) *Hogan, In re*, (1901) Ir. R. 168.

(*x*) *Cave v. Roberts* (1836), 8 Sim. 214.

make a gift to his wife, and the wife can hold chattels as her separate property, articles which were formerly regarded as paraphernalia will now, in most cases, become her separate property. Provided it be proved, to the satisfaction of the Court, that the articles of jewellery in question were, in fact, bestowed upon the wife absolutely and unconditionally with either the avowed or implied intention of passing to her the property therein. Chap. IV. s. 2.

Where, however, there is credible evidence that it was the intention of the husband merely to give the wife possession of certain articles of jewellery, for her adornment, in her capacity as wife, without relinquishing his own property therein (and it is submitted that evidence of such intention may be deduced, by implication, from the husband's general or former practice in such matters), then the articles constitute paraphernalia, and do not become, during the lifetime of the husband, the separate property of the wife, but are merely retained by her, in her custody, for the limited use for which they were originally bestowed upon her (*y*). And in such cases it seems that the principles of law relating to them remain unaffected by the Married Women's Property Acts.

On the death of the husband, in the absence of express agreement in bar (*z*), his widow may claim paraphernalia; that is to say, such articles of personal apparel, personal ornament, and personal convenience, suitable to her rank and degree, as she continued to use during the marriage, and jewels bought with her pin-money accede to her paraphernalia (*a*). These she may retain against all the world, except creditors, when there is a deficiency of assets (*b*). And, even then, her necessary clothing is protected; for, in the words of an ancient judicial resolution, "She ought not to be naked, or exposed to shame and cold" (*c*). Articles of apparel, and personal ornament and convenience.

Claim to necessary clothing good even against creditors.

(*y*) *Tasker v. Tasker*, (1895) P. 1.
(*z*) *Read v. Snell* (1743), 2 Atk. 642; *Cholmely v. Cholmely* (1688), 2 Vern. C. C. 81.
(*a*) *Offley v. Offley* (1691), Pre. Ch. 26.
(*b*) 2 Black. Com. 436; *Tipping*

v. Tipping (1721), 1 P. Wms. 730.
(*c*) 1 Rolle, 911, l. 55. If the husband deliver cloth to his wife for her apparel, and die before it be made up, she shall have the cloth: 1 Rolle, 911, l. 35; Com. Dig. Baron and Femme, Paraphernalia.

Chap. IV. s. 2.

Husband can sell or give away paraphernalia, but cannot bequeath them.

Neither can the husband by his will bequeath paraphernalia ; though it appears he has the power (if unkindly inclined to exert it) to sell them, or give them away (*d*). They are therefore not to be considered as belonging to the wife during the marriage for her separate use (*e*). For her right of property in them does not arise till she becomes a widow ; but vests in her immediately on the death of her husband (*f*).

Husband's possession of ornaments immaterial, if the wife had worn them on proper occasions. Value immaterial so long as suitable. Widow cannot claim heirlooms.

As to personal ornaments, the husband's possession of them makes no difference, provided the wife wore them at intervals. And it is enough that she so used them (*g*) on birthdays and public occasions (*h*). Nor is the question of value in this respect material, so long as the articles are suitable to her degree (*i*).

But the widow cannot claim, as paraphernal, articles which are in fact family heirlooms (*k*).

A "necessary bed" is an article of paraphernalia. See Rolle & Comyn's Dig. *ubi sup.* cit.

(*d*) 2 Black. Com. 436; Noy's Max. c. 49; and see sect. 17, Married Women's Property Act, 1882.

(*e*) *Graham v. Londonderry* (1746), 3 Atk. 393.

(*f*) Cro. Car. 344; Com. Dig. Bar. & Fem., Paraph.; and see *Hewson, In re* (1854), 23 L. J., Ch. 256.

(*g*) *Northey v. Northey* (1740), 2 Atk. 77.

(*h*) *Graham v. Londonderry* (1746), *ubi supra*.

(*i*) Cro. Car. 343; 1 Rolle, 911, l. 45; Com. Dig. Bar. & Fem., Paraph.; Toller's Executors, 3rd ed. p. 230, where he says, "The value makes no difference in the Court of Chancery." If so, the articles need not be suitable to the widow's degree. See *Northey v. Northey* (1740), *ubi supra*.

(*k*) *Calmady v. Calmady* (1719), 11 Vin. Abr. 181, 21. In this case, a husband having a crocheat of diamonds

which had belonged to his first wife, devised it to his eldest son, directing also that it should go in succession to the heir of his family as an heirloom. He afterwards married a second time, and converted the crocheat into a necklace, adding to it several new diamonds, the value of which was greater than the original value of the crocheat. Upon his death, the eldest son claimed the article by force of the will. But the second wife insisted on retaining it as part of her paraphernalia. The Lord Chancellor Macclesfield doubted at first whether turning the crocheat into a necklace, adding new diamonds to it, and permitting the wife to wear it, did not amount to a revocation of the bequest to the heir. But he afterwards ordered the Master to examine and separate the old from the new diamonds, and decreed the former only to the heir, leaving the widow to enjoy the new diamonds. See also *Jervoise v. Jervoise* (1853), 17 Beav. 566.

If a husband pawn his wife's paraphernalia as a collateral security for money borrowed, and gives power to the lender to sell for a sum certain, this will not be deemed an absolute alienation, but the paraphernalia (the power of sale not having been exercised) will stand as a pledge redeemable by the widow, who is entitled to have them redeemed, after payment of his debts, out of the personal estate of her husband' (*l*). But she shall have no merely *ornamental* paraphernalia where there are not assets for the payment of debts (*m*). And before simple contract and specialty creditors were placed on an equality, if the former were not satisfied out of the personal estate, or, by standing in the place of specialty creditors, out of the real estate, the paraphernalia would have been applied to make good the deficiency (*n*). And this even although they were presents made to the wife by the husband before marriage, because under the old law they became on the marriage the property of the husband, and he could not be considered as a trustee of such presents for his wife (*o*), and although contingent assets should afterwards fall in (*p*).

Chap. IV. s. 2.

She may redeem a pledge by her husband of her paraphernalia.

And may have the redemption money raised out of her husband's personal estate.

But creditors must first be satisfied.

But this will not apply to legatees; for their claims are merely voluntary, and, as observed by Lord Chancellor Maccolesfield in *Tipping v. Tipping* (*q*), "*Bona paraphernalia* are liable to creditors only," a position which accords with Lord Hardwicke's doctrine in *Graham v. Londonderry* (*r*), where he held that the

Her right superior to that of any legatees.

(*l*) *Graham v. Londonderry* (1746), 3 Atk. 393. In the case of *Vansittart, In re, Brown, Exp.*, (1893) 1 Q. B. 181, it was held that an avowed intention on the part of a husband to divest himself of the property in jewellery, and vest it in his wife would not avoid the right of his creditors under the provisions of sect. 47 (sub-sects. 1 and 3) of the Bankruptcy Act, 1883.

(*m*) Cro. Car. 346; 1 Rolle, 911, l. 50, 35; Com. Dig. Bar. & Fem., Paraph.; *Ridout v. Earl of Plymouth* (1740), 2 Atk. 104; *Parker v. Harvey* (1723), 4 Bro. P. C. 609;

Wilson v. Pack (1710), Pre. Ch. 295; *Townshend v. Windham* (1750), 2 Ves. sen. 1. As to jewels expressly bequeathed by a husband to his wife for her life, see *Boynton v. Parkhurst* (1784), 1 Br. C. C. 576.

(*n*) *Snelson v. Corbet* (1746), 3 Atk. 369.

(*o*) *Ridout v. Earl of Plymouth* (1740), 2 Atk. 104.

(*p*) *Burton v. Pierpoint* (1722), 2 P. Williams, 78.

(*q*) (1721), 1 P. Williams, 729; and see 3 Atk. 393.

(*r*) (1746), 3 Atk. 393.

Chap. IV. s. 2. widow's right to paraphernalia is superior to that of any legatee, whether general or specific.

Marshalling assets in her favour.

On the death of the husband the widow's paraphernalia are liable to his debts, but not until after all his other assets real and personal have been exhausted; and therefore, if the paraphernalia should be taken by creditors in satisfaction of their demands, the widow will be entitled to stand in their place, and to reimburse herself out of the real or personal assets, whether in the hands of the heir or devisee, or personal representatives or legatee (s).

If not claimed by herself, paraphernalia cannot be demanded by her executor or administrator.

Paraphernalia would appear to be so far personal to the widow, that, if she do not herself claim them in her lifetime, they cannot after her death be demanded by her executor or administrator. Accordingly, if the husband should bequeath them to her for life and then over, and she should make no election to have them *quâ bona paraphernalia*, her representative, after her decease, would be excluded (t).

Distinction between paraphernalia and gifts by a husband and stranger.

Paraphernalia and gifts to the wife as her separate property are essentially different. The latter are in every sense the absolute unfettered property of the wife (u). The former are the property of the husband during his life, vesting, if not disposed of by him during his life, in the wife on his death, if she survive him and claim them, but even then subject to the claims of her husband's creditors.

Whether, under the old law, articles were paraphernalia or gifts to the separate use of the wife was not always easy to determine. A husband might indeed make gifts to his wife for her separate use; but the general rule was, that where he gave articles to his wife, to be worn as ornaments of the person, they were to be considered as paraphernalia; for, if they were looked upon as gifts to her separate use, she might dispose of them

(s) *Snelson v. Corbet* (1746), 3 Atk. 369; *Inledon v. Northcote* (1746), 3 Atk. 430, 438; *Tipping v. Tipping* (1721), 1 P. Wms. 729; *Aldrich v. Cooper* (1802), 8 Ves. 381, 397; *Boyntun v. Boyntun* (1784), 1 Cox, 106; 3 & 4 Will. 4, c. 104.

(t) *Clarges v. Albemarle* (1691), 2

Vern. 246; Com. Dig. Bar. & Fem., Paraph.; and see *Offley v. Offley* (1691), Pre. Ch. 26.

(u) As to when such gifts constitute post-nuptial settlements for the purposes of the Bankruptcy Act, 1883, see *Vansittart, In re, Brown, Exp.*, (1893) 1 Q. B. 181.

absolutely, which would be contrary to his intention (*x*). Gifts Chap. IV. s. 2.

to a wife, under the old law, may be classified as follows:—

(1) Gifts by a husband to his wife, either before or after marriage, of articles of a paraphernal nature, were probably considered as paraphernalia; (2) gifts by a husband to his wife before marriage, of articles not of a paraphernal nature, vested in him again on the marriage; (3) gifts by a husband to his wife after marriage, of articles not of a paraphernal nature, might or might not be gifts to her separate use according to the intention; (4) but gifts to a wife by third parties, such as the husband's father, or the wife's father or a stranger, either before or after marriage, were usually *deemed absolute gifts to her separate use* (*y*): and then neither the husband, nor his creditors, could dispose of them any more than they could dispose of any other property vested in trustees for her separate use.

The Married Women's Property Act, 1882, has effected considerable alteration in the law of gifts to a married woman. After the 31st December, 1882, any unconditional gift to a wife by her husband or by any other person will be her separate property, which she can hold or dispose of as if she were a *feme sole* (*z*). The inability of the husband to make a gift of, or transfer any property, article or ornament directly to his wife is swept away, for a married woman is rendered capable on and after the 1st January, 1883, of acquiring, holding and disposing of any personal property as if she were a *feme sole* without the intervention of a trustee.

Effect of the Act of 1882 upon gifts to a married woman.

The results are that, on and after 1st January, 1883, the onus of probability is shifted, and all gifts to a wife by her husband of articles of personal apparel, ornament or convenience are presumably her separate property, unless they are either only lent to her for her use, or expressly given as paraphernalia. The mere fact of the articles being of a paraphernal nature will not necessarily render them paraphernalia, and so liable to be disposed of by the husband in his lifetime, and subject to the claims of his creditors during his life and after his death; but,

(*x*) *Graham v. Londonderry* on Executors, 10th ed. 590.

(1746), 3 Atk. 393.

(*z*) 45 & 46 Vict. c. 75, s. 1,

(*y*) *Ibid.*, 2 Rep. 143; Williams sub-ss. 1, 2, 5.

Chap. IV. s. 2. on the contrary, clear evidence will be required to show that they were when given, given with the intention of being paraphernalia and not separate property; and *a fortiori*, all gifts to a wife by any other person than her husband must necessarily be her separate property.

Origin of the term "paraphernalia."

The word "paraphernalia" has been borrowed from the Civilians, who themselves derived it from the Greeks. Its meaning with us, however, is very different from its more ancient signification. By the Roman law, the wife was not *in viri potestate*; and nothing passed to the husband by the marriage but the *Dos* or Dowry (a). The residue of the wife's property continued *separate property*, over which she exercised an independent dominion *non obstante matrimonio*. This separate property was called her *parapherna* or *peculium*. How entirely it was excluded from the husband's power appears by the following mandate of the Roman code:—"Decernimus ut vir, in his rebus quas extra dotem mulier habet, nullam habeat communionem, uxore prohibente, nec aliquam ei necessitatem imponat. Quamvis enim bonum erat, mulierem, quæ seipsam marito committit, res etiam ejusdem pari arbitrio gubernari,—attamen nullo modo, muliere prohibente, virum in paraphernis se volumus immiscere" (b). It really meant property of her own, not surrendered by her at her marriage; property reserved and kept back from the *Dos*, or fortune, which she brought her husband (c): and not as in English law according to Blackstone, "something over and above her dower": dower being used in the legal sense of the interest she was entitled to in her husband's real estate on his death. Moreover, it belonged to her as her absolute separate property *during and throughout the marriage*. Whereas the wife in England does not become entitled to her paraphernalia till the husband dies; and although he cannot bequeath them, he

(a) The Latin *Dos* is translated not by *Dower*, but by *Dowry*; things not only different from, but opposite to each other. What we call Dower was unknown to the Romans: 1 Cruise's Dig. 128. See Glanville, lib. 7, c. 1, where he says, "Secundum Leges Romanas proprie

appellatur *Dos* id quod cum muliere datur viro."

(b) Cod. v. 14, 8.

(c) Paraphernalia Bona quibusvis ex rebus consistant sunt ea quæ a dote semper distincta in usum mulieribus erant, atque in earum arbitrio posita.

may sell them in his lifetime, or give them away. The Roman *parapherna* corresponded not with the English paraphernalia; but it did correspond with, and seems very much to resemble, the separate estate of married women in this country originally invented and contrived by courts of equity; and now, since the 31st December, 1882, attached and extended by statute to all the property of married women.

Chap. IV. s. 2.
The Roman parapherna resembled the English separate estate.

SECTION III.

THE RIGHT OF THE WIDOW BY SURVIVORSHIP TO HER CHATTELS REAL.

The widow was always entitled to such of her chattels real as were found, at her husband's death, undisposed of by him in his lifetime; for the husband could not by will dispose of his wife's chattels real (*d*).

Chap. IV. s. 3.

As, since the 31st December, 1882 (*e*), the husband takes by marriage no interest whatever in his wife's chattels real during her life, and they are her separate property, and cannot be disposed of by him, it is almost unnecessary to state that the death of the husband, leaving the wife surviving, adds nothing to the existing right of the widow to hold and dispose of her own property.

SECTION IV.

THE RIGHT OF THE WIDOW BY SURVIVORSHIP TO HER CHOSE IN ACTION.

The subject of this section has, since the Married Women's Property Act, 1882, ceased to be of any importance, except where the marriage has taken place before the 1st January, 1883, and the right to the chose in action has accrued before

Chap. IV. s. 4.

(*d*) See Williams on Exors. 10th ed., p. 524.

(*e*) 45 & 46 Vict. c. 75.

Chap. IV. s. 4. that date. As in every other case the wife's chose in action is her separate property (being in the Married Women's Property Act, 1882, included in the term "property" (*f*)), and her right to it is unaffected by marriage, no additional right can accrue to her by the death of her husband. This section, therefore, applies only to the above-mentioned exception.

Widow's
right to her
chose in
action arose
on death of
husband.

Prior to the Married Women's Property Act, 1882, as stated in a former chapter (*g*), the right of a husband to his wife's choses in action was an inchoate right, which only became absolute by his reducing them into possession during the coverture. If he had not done so, upon the death of the husband the widow's right by survivorship arose (*h*).

The rule in equity, as we have seen (*i*), was that nothing short of actual reduction into possession by the husband, or his assignee, would bar the widow's right by survivorship.

The common law courts, however, at one time appear not to have been so rigid. For in *Gaters v. Madeley* (*k*), the right of survivorship was held by one of the learned judges (the others not dissenting) to be defeated, the moment it appeared that the husband in his lifetime had made an election to take the chose in action to himself, and had dissented to his wife's having any interest in it.

This doctrine of *election* and *dissent* was never adopted by the Courts of Equity, and is now of course entirely exploded.

In *Fleet v. Perrins* (*l*), the action was brought by the plaintiff as administratrix of one Mary Anne Ross, deceased, for money had and received by the defendant to the use of M. A. Ross. The defendant had received money from a third person to be appropriated to the use of M. A. Ross, then the wife of T. R. Ross, and he wrote telling her that he held the money at her

(*f*) 45 & 46 Vict. c. 75, s. 24.

(*g*) *Ante*, p. 35 *et seq.*

(*h*) *Fleet v. Perrins* (1868), L. R., 3 Q. B. 536; *ibid.* 4 Q. B. 500.

(*i*) *Ante*, p. 39.

(*k*) (1840), 6 Mee. & Wel. 423.

(*l*) (1868), L. R., 3 Q. B. 536; affirmed, *ibid.* 4 Q. B. 500. Com-

pare *Bird v. Pegrum* (1853), 13 C. B. Rep. 639; 22 L. J., C. P. 166, where money had actually come to the hands of the wife and had been subsequently lent by her, and it was held that the husband after the death of the wife could sue in his own name.

disposal. T. R. Ross survived his wife, and died, never having at any time interfered in any way as to the money. It was held on these facts that the wife's representative, and not the husband's, was the proper party to sue for the money, as the facts showed a chose in action conferred on the wife with which the husband had not interfered during coverture. Chap. IV. s. 4.

Causes of action, which accrued during the coverture, in respect of the wife's real estate, or in respect of any personal wrongs done her, survived to her on the death of her husband (*m*).

When a man covenanted to pay a woman an annuity for life, and afterwards married the annuitant, it was held by the Judicial Committee of the Privy Council, that the annuity was only suspended, and not extinguished, by the marriage, and therefore that the widow was entitled to recover arrears accrued subsequently to the death of her husband (*n*). It is apprehended that in the case of a marriage in similar circumstances since the 31st December, 1882, the right to the annuity would not be suspended by the marriage; but it is not certain whether the widow could recover arrears accrued during the coverture, when she had been maintained by her husband in a manner suitable to her station (*o*).

In a recent case (*p*), in which a married woman annuitant died after the making of an order by the Court for the purchase of an annuity upon her life, but before the actual purchase of such annuity, it was held that the capital sum, specifically allocated for the purchase of such annuity, acceded to her personal estate, although during her lifetime she was restrained from anticipation, and that her husband was entitled to take the money over.

(*m*) *Woodman v. Chapman* (1808),
1 Camp. 189, n.

(*n*) *Fitzgerald v. Fitzgerald* (1868),
L. R., 2 P. C. 83.

(*o*) *Ridout v. Lewis* (1738), 1 Atk.
269.

(*p*) *Ross, In re, Ashton v. Ross*,
(1900) 1 Ch. 162.

SECTION V.

DOWER.

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Antiquity and
universality
of right.

The custom of primogeniture, by which land on the father's death goes exclusively to the eldest son, was qualified, from the earliest times, by allowing a third to the widow for life, not only to support herself, but also for the nurture, maintenance and education of the younger children. This was called her dower; than which, in its simple original state, no right known to the law could well be deemed more reasonable and just. It was, in fact, an indispensable social institution, universally adopted under the feudal system. Insomuch that dower, or something analogous to it, by whatever name distinguished, was recognized, enforced and protected in all parts of Europe.

How it proved
inconvenient.

However well suited to a primitive state of society, dower, with the progress of civilization, ceased to be an assured support

to the widow, while it created a most serious obstacle to the alienation of land. These results were mainly attributable to the early decisions of the judges, that dower did not attach to equitable estates, and that land acquired during the coverture was subject to dower in the same way as that of which the husband was seised at the date of the marriage. The anomalous state of the law whereby curtesy was, although dower was not, allowed out of equitable estates, admits of the following explanation:—Uses, before the statute (*q*), gave no right either to curtesy or dower: for the common law regarded nothing but the *legal* title; and equity, at that time, was feeble and imperfect. After the statute, trusts were deemed the same thing as uses had been before the statute. Dower, accordingly, did not arise upon them. So that when the husband's estate was merely equitable, he could sell and alienate it without his wife's concurrence, and the purchaser's title was unencumbered by dower. So many sales had been effected on this assumption, that when the Court of Chancery came, at last, under the administration of a succession of great men, to understand the proper functions of equity, it was too late to interfere.

Why curtesy of trusts allowed, but dower of trusts refused.

But no such impediments existed to prevent its interposition in the case of curtesy. There were, and there could have been, no sales of the *wife's* estate, without the husband's concurrence. Consequently, equity experienced no difficulty in awarding curtesy out of trust or equitable estates, which it did by an exercise of its corrective jurisdiction. The same reasons, indeed, applied with equal force in the case of dower; but from the number of transactions concluded upon a contrary principle, and the hazard of disturbing titles, it was thought that the extraordinary remedies of the Court of Chancery might, with respect to dower after such a lapse of time, do more harm than good. The consequence was that dower was left to stand on its ancient footing under the common law, by which trust or equitable estates were not recognized. And it also was liable to be defeated by an outstanding term (*r*).

(*q*) Statute of Uses, 27 Hen. 8, c. 10.

(*r*) *Lady Radnor v. Vandebendy*, Show. P. C. 69; Cruise's Dig. tit.

Chap. IV. s. 5. Upon the decision in *Radnor v. Vandebendy*, Mr. Cruise observed, that the doctrine established by it was—

“Contrary to the general principles of equity, which has never extended its protection in any other instance to purchasers with notice of incumbrances. The true and only reason on which it was founded was the silent, uniform course of practice, uninterrupted, but at the same time unsupported, by legal decisions; an opinion having been generally adopted by the conveyancers, that a satisfied term would protect a purchaser from the claim of dower; and many estates having been purchased under this opinion.”

It was afterwards decided that mortgagees were within the same privilege (*s*). But it was not allowed to extend to volunteers: for example, to heirs. In such cases, if there were a satisfied term outstanding, the widow might come into equity to have it put out of the way, so as to give her the benefit of dower.

Dower held to attach to land acquired during coverture and sold.

The inconvenience arising from the decision, that dower attached to land acquired by the husband during the coverture, and sold by him during his life, precisely in the same way as if the possession had been in the husband at the date of the marriage, and had continued in him undivested until the moment of his death, led to many ingenious and laudable contrivances to evade or to defeat the injustice of the law. Accordingly, we have, among other expedients, the celebrated “conveyance to uses to bar dower”; which, of all the inventions of the conveyancers, was the most happy and successful. It was, indeed, a great triumph, and deserves the praise which the lovers of technical erudition have invariably bestowed upon it.

The subject of Dower was very fully considered by the Real Property Commissioners, who, in their First Report, suggested the alterations in the law which were afterwards carried into effect by the “Act for the Amendment of the Law relating to Dower” (*t*).

Trust. In this case the House of Lords seemed inclined to decide the contrary, but did not, on the ground that it had always been the opinion of conveyancers that a term or statute prevented dower, and that

the consequence of an alteration would be much more dangerous than a continuance of the old rules.

(*s*) *Hill v. Adams* (1741), 2 Atk. 208.

(*t*) 3 & 4 Will. 4, c. 105.

This Act, which came into operation on the 1st January, 1834, Chap. IV. s. 5.
and is not retrospective, conferred upon widows the right to The Dower Act.
dower out of equitable estates (*u*); but this extension of the right was more than counterbalanced by the provisions of the Act, which left the dower of the widow completely at the mercy of the husband during his life.

The 2nd section provides, that when a husband shall die beneficially entitled to any land for an equitable estate of inheritance in possession (other than an estate in joint tenancy), his widow shall be entitled in equity to dower out of the same land. It has been held, under this section, that a devise by a husband of all his real estate upon trust to sell was such a disposition by will as deprived the widow of her dower (*x*).

The 3rd section gives dower to the widow where the husband had merely a right of entry, or of action, for the recovery of the land.

But the 4th section enacts that no widow shall be entitled to dower "out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will." So that the widow's dower is by this clause put under the absolute power of the husband, to sustain, to abridge, to mutilate, or to destroy. Dower placed entirely in husband's power.

Under this section, a husband's contract to sell (although no conveyance be executed) will bar the right to dower; upon the principle that what is agreed to be done shall be considered in equity as performed.

The 5th section of the Act enacts that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

A declaration that the widow shall not be entitled to dower contained in the deed conveying the land to the husband, or in any deed executed by him (*y*), or in his will (*z*), is sufficient to deprive the widow of her right to dower (*a*).

(*u*) 3 & 4 Will. 4, c. 105, s. 1.

(*x*) *Lacey v. Hill* (1875), L. R., 19 Eq. 346, where Jessel, M. R., dissented from the dicta in *Rowland v. Cuthbertson* (1869), L. R., 8 Eq. 466.

(*y*) Sect. 6. And see *Fairley v. Tuck* (1857), 27 L. J., Ch. 28.

(*z*) *Thompson v. Watts* (1862), 31 L. J., Ch. 445.

(*a*) Sect. 7. See *Dyke v. Rendall* (1852), 2 De G., M. & G. 209; *Fry*

Chap. IV. s. 5.

But a provision for a wife out of personal estate will not bar dower, in the absence of express words, unless such provision be specifically described as a jointure. A jointure (properly so called), or any provision if made and accepted (*b*) as a jointure by a woman of full age, or by the guardians of an infant on her behalf (*c*), constituting an effectual bar to dower (*d*).

The right of the widow to dower is subject to any conditions, restrictions or directions which shall be declared by the will of her husband (*e*).

By the 9th section it is enacted, that where a husband should devise any land out of which his widow would have been entitled to dower if the same had not been so devised, or any estate or interest therein, to or for the benefit of his widow, such widow should not be entitled to dower out of or in any land of her said husband, unless a contrary intention should be declared by his will.

A partial interest in the proceeds of sale of real estate, devised to trustees upon trust for sale, is "an estate or interest" in the land within the meaning of this section (*f*).

It is also provided, that no gift or bequest made by the husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will (*g*). Consequently under an intestacy a widow's right to dower survives (*h*).

Courts of
Equity may
still enforce
covenants not
to bar dower.

The 11th section preserves the powers of Courts of equity to enforce any covenant or agreement entered into, by or on the part of any husband, not to bar the right of his widow to dower out of his lands or any of them.

Wherever, therefore, a husband sells an estate, the purchaser should ascertain that there has been no covenant or agreement

v. Noble (1855), 20 Beav. 598; 7 De G., M. & G. 687.

(*b*) *Daly v. Lynch*, 3 Bro. P. C. 478.

(*c*) *Harvey v. Ashley* (1748), 3 Atk. 607.

(*d*) *Lemon v. Mark*, (1899) 1 Ir. R. 416, C. A.

(*e*) Sect. 8.

(*f*) *Rowland v. Cuthbertson* (1869), L. R., 8 Eq. 466; *Lacey v. Hill* (1875), L. R., 19 Eq. 346.

(*g*) Sect. 10.

(*h*) *Rea, In re, Rea v. Rea*, (1902) 1 Ir. R. 451.

preventing the vendor from barring the wife's right to dower. Chap. IV. s. 5. How the fact stands, it will not always be easy to find out; and sometimes the discovery may be beyond the reach of any diligence that a purchaser can exercise (*i*).

The 13th section abolished dower *ad ostium ecclesie* and dower *ex assensu patrie* which had long become obsolete.

The 12th section of the Dower Act provides, that nothing in the Act shall interfere with any rule of equity, or of any ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower were entitled to priority over other legacies. This section does not mean that, in all cases, for the purpose of ascertaining the widow's right to priority, her title to dower is to be determined under the old law; but merely that the principle of the previous decisions is not to be affected by the Act. In order to gain priority in respect of a legacy in lieu of dower, a widow married since the 1st January, 1834, ought therefore to be actually entitled to dower under the new law; and it has been accordingly held (*k*), that the widow was not entitled to priority where the only real estate of the testator had been conveyed to him with a declaration against dower. There was in this case a complete disposition by the will of all the testator's real estate, but it seems to have been the opinion of the learned judge (*l*) who decided the case, that when the will itself barred the widow of her right to dower, the 12th section applied, and gave her priority as if the Act had not been passed.

To establish the widow's right to dower it seems superfluous To establish

(*i*) The purchaser, however, may be protected by having the legal estate, and by want of notice. In *Jones v. Smith* (1797), 1 Phill. 244, a mortgagee was told that there was a settlement, but was also told that the particular estate was not included in it, and he advanced his money without seeing the settlement; yet the Court refused to interfere against him. If, however, a purchaser chooses to take a mere equitable estate, he may incur danger. Even a *parol* ante-nuptial

agreement, interdicting a husband from barring a wife's dower, might possibly be enforced, although evidenced only by a document signed *after* the marriage. See the reasoning in *Hammersley v. De Biel* (1845), 12 Cl. & Fin. 45; and in particular the remarks of Lord Cottenham, both in the Court below and in the House of Lords.

(*k*) *Roper v. Roper* (1876), 3 Ch. D. 714.

(*l*) *Malins, V.-C.*

Chap. IV. s. 5. to say that she must previously have been the lawful wife of her deceased husband. Yet this is much insisted upon by Mr. Roper (*m*), who gravely informs us that the husband's second marriage during the life of his first wife will not entitle the second widow to dower; to which he adds another proposition equally self-evident, namely, that if a wife take a second husband before her first husband dies, she will not be dowable out of the second husband's estate. It has also been decided (*n*), that a dissolution of marriage under the Divorce Act (*o*) destroys the right to dower.

right to dower there must have been a valid marriage.

Conditions necessary to entitle widow to dower.

Subject to the provisions of the Dower Act, which, as we have seen, enable the husband in various ways to deprive his widow of dower, the following conditions must be fulfilled, in order to entitle a widow to dower:—

1. Legal marriage.
2. A several estate of inheritance in possession, of or to which the husband is seised or entitled (*p*).
3. Possibility that issue, if any, should inherit the estate.
4. Death of the husband.

Before the Dower Act, questions frequently arose as to whether the widow was put to her election between her dower and some benefit conferred upon her by the will of her husband (*q*).

Election by widow.

But this question of election by a widow between her dower and the benefits bestowed upon her by the will of her husband, can scarcely arise where the marriage has taken place since the 1st January, 1834, except in the case of copyholds (*r*) to which the Dower Act does not apply, for in such cases the widow has no right to dower which cannot be defeated by the testamentary disposition of her husband.

Dower may be barred by antenuptial provision.

The right to dower may also be excluded by any provision which is accepted by an adult female previous to marriage in

(*m*) 1 Rop. 333.

(*n*) *Frampton v. Stephens* (1882), 21 Ch. D. 164.

(*o*) 20 & 21 Vict. c. 85.

(*p*) *Jones v. Jones* (1832), 2 C. & J. 601; 2 Tyr. 531.

(*q*) *Boynton v. Boynton* (1784), 1 Bro. C. C. 445; *Nottley v. Palmer* (1854), 2 Drew. 93; and see *Fytche v. Fytche* (1868), L. R., 7 Eq. 494.

(*r*) *Thompson v. Burra* (1873), L. R., 16 Eq. 592.

satisfaction of her dower (s). Where a wife joined with her husband in making a mortgage in fee of a freehold estate, upon which her inchoate right to dower had attached, her dower was destroyed in equity as well as at law; and she had no right to redeem the estate (t). Chap. IV. s. 5.

Dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that savour of the realty; as rents, estovers, commons, advowsons, fairs, profits of courts, tithes, woods, mills, piscaries, tolls arising from public navigable rivers, and the like (u). Out of what dower may be claimed.

The widow likewise is dowable of mines and minerals worked in the husband's lifetime; but not of mines unopened (x). Mines worked in husband's lifetime.

She is not dowable of a mere annuity granted to the husband and his heirs: because *that* is a personal demand, not issuing out of any lands or tenements (y). Case of an annuity to husband and his heirs.

It is a maxim that the widow shall be endowed *de optimâ possessione viri*. If, therefore, lands which had been sown with corn and grain by the husband be assigned to her for dower by the heir, she will be entitled to the crops (z). Crops of corn and grain.

She is also entitled to emblements, and may dispose of them (a). Emblements.

The claims of mere creditors of an intestate have no priority over the widow's right of dower (b). Creditors no priority.

Where land belonging to an infant, subject to his mother's right of dower, is taken by a railway company, and the purchase-money paid into Court under the Lands Clauses Act, the widow is entitled to have the value of the dower, as determined by the valuers, paid to her out of the fund in Court (c). Land taken by railway company.

It would seem that she is clearly liable to one-third of the Widow bound

(s) *Dyke v. Rendall* (1852), 2 De G., M. & G. 209; *Caruthers v. Caruthers* (1794), 4 Bro. C. C. 500. But see *Lemon v. Mark*, (1899) 1 Ir. R. 416, C. A. 1 Taunt. 402; *Dicken v. Hamer* (1860), 29 L. J., Ch. 778.

(y) *Earl of Stafford v. Buckley* (1750), 2 Vos. sen. 170.

(z) 1 Rep. 351.

(t) *Dawson v. Bank of Whitehaven* (1877), 6 Ch. D. 218.

(a) 1 Rep. 426.

(u) 1 Rep. 342.

(b) *In re Hall* (1870), L. R., 9 Eq. 179.

(x) *Stoughton v. Leigh* (1808),

(c) *Spyer v. Hyat* (1855), 20 Beav. 621.

Chap. IV. s. 5. duties attaching to the estate; upon which principle she must to keep down interest. contribute her proportion to keep down interest (*c*).

Liab. for waste.

As a tenant for life, she is liable for all waste committed by herself or strangers (*d*).

How far she is answerable for letting the buildings fall into decay does not appear to have been the subject of any authoritative resolution (*e*).

Dower forfeited by adultery.

By the Statute of Westminster (*f*) a wife guilty of adultery forfeits her dower; and it has also been decided that the dissolution of the marriage produces the same effect (*g*).

Statute of Limitations, 37 & 38 Vict. c. 57.

A widow's right to sue in equity is barred if she does not commence proceedings within twelve years after the right first accrued (*h*); and only six years' arrears can be recovered (*i*).

As to the abolition of dower, in certain cases, in Ireland, under the Local Registration of Title Act, 1891, see 54 & 55 Vict. c. 66, s. 85.

SECTION VI.

THE WIFE'S EQUITY OF REDEMPTION AND EXONERATION.

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Her equity to redeem her real estate.

In cases where the husband and wife joined in mortgaging the wife's estate of inheritance, and the mortgage money was

(*c*) 1 *Rop.* 371, 376.

(*d*) *Co. Litt.* 53, 54; 2 *Inst.* 303.

(*e*) As to her right to grant leases, see 40 & 41 *Vict. c.* 18, ss. 46—48.

(*f*) 13 *Edw. 1, c.* 34.

(*g*) *Frampton v. Stephens* (1882),

21 *Ch. D.* 164.

(*h*) 37 & 38 *Vict. c.* 57, s. 1; and see *Marshall v. Smith* (1865), 5 *Giff.* 37.

(*i*) 3 & 4 *Will. 4, c.* 27, s. 41.

not applied for the exclusive benefit of the wife, the equity of redemption belonged to her and her heirs, and her estate was treated as a surety for the debt of the husband (*k*). The same result followed, when the separate property of the wife formed the subject-matter of the mortgage, and the husband joined in the deed, received the money and covenanted to repay it (*l*). This doctrine does not seem to be affected by the recent changes in the law of husband and wife; but, in order to entitle the wife's estate to exoneration, it must still be shown that the money was received by the husband, and it would also seem that he must be a party to the mortgage deed and covenant for payment of the money. Chap. IV. s. 6.

Upon mortgages of the wife's estate very nice and difficult questions occasionally arise. Thus, where, subsequently to the mortgage being effected, the husband became insolvent, the right of redemption was decreed to the assignees and the wife. And upon the former disclaiming the right, as against the mortgagee, it was held to vest in the wife alone, who upon redemption was decreed entitled to have the entire fee settled upon herself (*m*). As a general rule, it will be construed that the equity of redemption remains in the wife and her heirs. But it may happen, and has been often found, that the equity of redemption is transferred to the husband and his heirs. Before the wife, however, can thus be deprived of her estate, it must be made quite manifest that a *change of property* was intended (*n*). Thus, where an estate belonging to the wife was mortgaged, and the equity of redemption was in words reserved to the husband and his heirs, the Court held that there was a resulting trust for the wife and her heirs (*o*). In another case, a husband, having married a widow who had an estate in fee under the will of her former husband, procured her to join him Insolvency of husband.

(*k*) *Huntingdon v. Huntingdon* J. 79.
(1702), 2 Bro. P. C. 1; *Jackson v. Innes* (1819), 1 Bli. 104, 115, and cases there cited.

(*l*) *Hudson v. Carmichael* (1854), Kay, 613; see also *Clinton v. Hooper* (1791), 3 Bro. C. C. 201, at p. 213; *Thomas v. Thomas* (1855), 2 K. &

(*m*) *Gleaves v. Paine* (1863), 32 L. J., Ch. 182; *Hill v. Edmonds* (1852), 5 De G. & S. 603.

(*n*) *Wood v. Wood* (1844), 7 Beav. 183.

(*o*) *Jackson v. Innes* (1819), 1 Bli. 104, 115.

Where reserved to the husband, a resulting trust for the wife will be raised.

Chap. IV. s. 6. in a mortgage of the estate, reserving the equity of redemption to the husband and his heirs; without recital in the deed of anything special, to show that it was intended to make a new settlement of the estate. It was decreed that the equity of redemption had not been taken out of the wife; and, consequently (she having died), that her son by her first marriage was entitled to it (*p*). Again, where a wife joined in a mortgage for the purpose of releasing a rent-charge to which she was entitled under her marriage settlement, it was held that the release, although absolute in form, was to be limited by the purpose for which it was made, and that the equity of redemption was subject to the trusts of the original settlement (*q*).

But dower destroyed if released for purposes of mortgage.

The contrary rule prevailed in the case of dower. If the wife joined in a mortgage in fee for the purpose of releasing her dower, it was held that her right was extinguished in equity as well as at law; and that she had no right to redeem or to claim exoneration out of her husband's estate (*r*).

The husband will only have the equity *jure uxoris*.

The general rule was that, where husband and wife mortgaged the wife's estate, and the equity of redemption was reserved to the husband and his heirs, without recital of special circumstances to show an intention to make a new settlement of the estate, the husband took the equity of redemption only *jure uxoris*.

Mere form of the reservation immaterial.

"And in considering this question," says Lord Redesdale, "the mere form of the reservation of the equity of redemption will not of itself be held sufficient to alter the previous title. In such a case (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage" (*s*).

(*p*) *Ruscombe v. Hare* (1817), 6 Dow. 1; see also *Whitbread v. Smith* (1854), 3 De G., M. & G. 727; *Hipkin v. Wilson* (1850), 3 De G. & Sm. 738; *Plowden v. Hyde* (1852), 2 De G., M. & G. 684; *Lord Hastings v. Astley* (1861), 30 Beav. 260.

(*q*) *Wood v. Wood* (1844), 7 Beav. 183; *Re Betton's Trust Estates* (1871), L. R., 12 Eq. 553.

(*r*) *Dawson v. Bank of Whitehaven* (1877), 6 Ch. D. 218, reversing the decision of Bacon, V.-C., 4 Ch. D. 639.

(*s*) Per Lord Redesdale, in *Jackson v. Innes* (1819), 1 Bli. at p. 115.

"But if it clearly appear to have been the intention of the wife that the husband should have the equity of redemption, he *must* have it" (t). This intention may be established by parol evidence (v), or "it may be shewn on the face of a mortgage deed, that there is an intention to re-settle the equity of redemption, but it must be shewn by something which bears expressly on that identical point" (x).

Chap. IV. s. 6.

But if a change were really intended, effect must be given to it.

How proved.

Wherever, therefore, the transaction, importing more than a mere mortgage security, gives satisfactory evidence of an intention to effect a change of the beneficial interest, the husband and his heirs, and not the widow or her heirs, will be entitled to the equity of redemption (y).

The law on this subject was deeply considered and learnedly discussed in the case of *Jackson v. Innes*, where the decree of Lord Eldon, in the Court of Chancery, was, on the motion of Lord Redesdale (and with the assent of Lord Eldon himself), reversed by the House of Peers.

Jackson v. Innes.

The Lord Chancellor Eldon.—"The circumstances of this case are certainly, in point of fact, much better understood than they were; and much greater research has been made into cases, so as to bring before the consideration of the House the true principle of decision. The Court below did not rightly apprehend the case, as it now appears. The judgment of this House will remove a difficulty, which I know is floating in the minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that, in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to leave the wife to understand what those limitations were. It does, however, occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported; and, therefore, I am of opinion that the decree must be reversed."

Lord Eldon's remarks in *Jackson v. Innes.*

Decree reversed accordingly (z).

In *Reeve v. Hicks* (a), Sir John Leach held that a widow

Reeve v. Hicks.

(t) Per Lord Eldon, in *Ruscombe v. Hare* (1817), 6 Dow. 1.

(y) *Jackson v. Innes* (1819), 1 Bli. 104.

(u) *Clinton v. Hooper* (1791), 3 Bro. C. C. 201.

(x) Per Sir J. Wickens, V.-C., in *Re Betton's Estate* (1871), L. R., 12 Eq. 553; see also *Jones v. Davies* (1878), 8 Ch. D. 205.

(z) The case of *Jackson v. Innes* (1819) is remarkable as being the only instance in which a judgment of Lord Eldon's was reversed.

(a) (1825), 2 Sim. & Stu. 403.

Chap. IV. s. 6. was entitled to redeem her copyholds which had been charged during the coverture; but with respect to her freeholds, which had been also charged on the same occasion, the circumstances were as follow, namely—that the husband and wife had mortgaged them for a thousand years, reserving the power to redeem to them or either of them; and they likewise covenanted to levy a fine to the mortgagee for the term, and, subject thereto, to *the husband and his heirs and assigns for ever*. A fine was duly levied pursuant to the covenant; and the husband subsequently released his equity of redemption to the mortgagee in fee, who entered into possession. His Honor observed that “the case was not distinguishable in principle from that of *Jackson v. Innes*. The limitation of the uses of the fine had no connection with the purposes of the mortgage, or the proviso of redemption, *but was altogether a new settlement*.” The widow, therefore, was not allowed to redeem, for she had by her own act, and in a legal manner, not merely mortgaged her estate for her husband's debt, but actually transferred the entire beneficial interest out and out from herself and her heirs to her husband and *his* heirs; a result which the Court will in general be reluctant to admit, but which it cannot in the face of strong acts and expressions exclude; for there is no reason in law or equity why a wife should not, if so minded, convey her estate to her husband (*b*).

Wife's equity
to exonera-
tion.

Treated as a
surety.

The widow has also a right in equity to have her estate exonerated out of her husband's assets. This equity is put upon the principle that she is considered, when mortgaging her property for her husband's debt, to stand in the attitude of a *surety*; from whence it follows that she must be invested with the usual privileges of that character, the first of which is indemnity from the principal for whose benefit her security was interposed.

Thus we have it laid down by Lord Hardwicke, with his accustomed clearness, that

“It is a common case for a wife to join in a mortgage of her inheritance

(*b*) See *Eddleston v. Collins* (1851), (1858), 2 De G. & J. 399; *Atkinson v. Smith* (1858), 3 De G. & J. 186.
3 De G., M. & G. 1; *Heather v. O'Neil*

for a debt of her husband. After his death she is entitled to have her real estate exonerated out of his personal and real assets; the Court considering her estate only as a surety for his debt" (c). Chap. IV. s. 6.

The same great judge, in *Parteriche v. Poulet* (d), says that the wife, paying her husband's mortgage debt by way of loan, she having separate estate, must be considered as a distinct person, and is equally entitled to stand in the place of the mortgagee as a stranger; adding, also, that if she joins with him in charging her estate, she is, if she survives him, entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate. Hence it follows, as indeed Lord Hardwicke declared in *Robinson v. Gee* (e), already cited, that the other creditors of the husband cannot stand in the place of the mortgagee against her (f). So that they are entitled to no preference over her in the administration of his assets.

She is entitled to stand in the place of the mortgagee.

Husband's other creditors have no preference over her.

If the money was borrowed for the benefit of the wife, she will not be entitled to her equity of exoneration (g). And a similar rule applies where the wife told the executor of her husband's estate that she would not raise her claim (h).

In *Scholefield v. Lockwood* (i), husband and wife having a joint power of appointment over an estate the ultimate limitations of which, in default of appointment, were to the use of the husband

Scholefield v. Lockwood.

(c) *Robinson v. Gee* (1858), 1 Ves. sen. 251; see also remarks of Lord Camden in *Kinnoul v. Money* (1818), 3 Swanst. 202, n., at p. 217; *Hudson v. Carmichael* (1854), Kay, 613.

(d) (1742), 2 Atk. 384. See, however, *Ferguson v. Gibson* (1872), L. R., 14 Eq. 379.

(e) *Ubi supra*.

(f) The words of Lord Hardwicke are: "None of his (the husband's) creditors have a right to stand in the place of the mortgagee to come round on the wife's estate." Upon the bankruptcy of the husband, the wife after she has paid the debt, is entitled to go in as a creditor upon her husband's estate

in bankruptcy, and there with his other creditors to receive a dividend. Per Lord Westbury, C., in *Gleaves v. Paine* (1863), 1 De G., J. & S. at p. 96; see *White & Tudor's Leading Cases*, 7th ed. Vol. 1, pp. 633 and 642.

(g) *Earl of Kinnoul v. Money* (1818), 3 Swanst. 202, n.; *Clinton v. Hooper* (1790), 1 Ves. jun. 173; see also *Thomas v. Thomas* (1855), 2 K. & J. 79.

(h) *Clinton v. Hooper* (1790), 1 Ves. jun. 173; 1 R. R. 102.

(i) (1863), 4 De G., J. & S. 22. See also *Heather v. O'Neil* (1858), 2 De G. & J. 399; *Jones v. Davies* (1878), 8 Ch. D. 205.

Chap. IV. s. 6. and wife in moieties in fee, executed the power by way of mortgage to secure the husband's debt; it was held by Lord Westbury, C., affirming the decision of Sir J. Romilly, M. R., that this was no mortgage of the wife's estate, and consequently that she was not entitled to have her moiety exonerated out of the estate of the husband.

CHAPTER V.

LIABILITIES ARISING FROM THE DISSOLUTION OF THE
MARRIAGE BY THE DEATH OF THE HUSBAND.

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As a general rule it would appear that the widow is not bound to bury her deceased husband, an obligation which seems with more reason and justice to fall on the husband's representative (a). "The law," said Mr. Justice Kay in a modern case (b), "is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried."

Whether the widow is bound to bury her deceased husband.

It has been held, however, by the Court of Exchequer (c), that a widow, who was also an infant, might bind herself by contract for the expense of her husband's interment. This conclusion (arrived at by an exercise of judicial ingenuity, which may be thought not entirely to have overcome the difficulties of the subject) proceeded on the ground that the decent burial of the deceased husband should be construed to be a

(a) See *Tugwell v. Hayman* (1812), 3 Camp. 298; *Rogers v. Price* (1829), 3 Y. & J. 28.

(b) *Williams v. Williams* (1881), 20 Ch. D. 659.

(c) *Chapple v. Cooper* (1844), 13 Mee. & Wel. 252.

Chap. V.

benefit and comfort to his surviving and sorrowing widow ; and therefore that the case should be regarded as coming within the rule of law, which makes the contract good where the infant is a gainer by it. After holding that an infant husband could contract for the burial of his deceased wife, she being *persona conjuncta* with him, and her interment being a personal benefit to him, the Court said :—" If this be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end ; and so she may contract, and her infancy is no defence if the contract be for her personal benefit." But a promise by a widow to pay her husband's debts is not enforceable at law (*d*).

Revival of
wife's liabilities.

During marriage, the wife was formerly protected by her coverture from being sued in respect of debts contracted by her *dum sola* (*c*) ; unless, indeed, she had separate property. When, however, her coverture was put an end to by the death of her husband, she again became subject to a demand for those debts which, having been contracted by her before marriage, had remained undischarged and unsatisfied during the coverture (*f*).

Ante-nuptial
debts.

Property
liable under
the Act of
1882 as
amended by
the Act of
1893.

There seems to be no doubt that this is still law, and that a widow can be sued in respect of debts contracted by her previously to her marriage (*g*). It is also clear that where a woman married since the passing of the Married Women's Property Act, 1893 (*h*) (which is apparently not retrospective), has incurred liabilities during marriage, she will remain liable after the death of her husband, not only to the extent of what was her separate property during the coverture, but also in respect of any property which she may have acquired after the dissolution of the marriage by her husband's death, provided such property be free from a restraint upon anticipation.

(*d*) *Petch v. Lyon* (1846), 9 Q. B. 147 ; *Loyd v. Lee* (1824), 1 Stra. 94.

(*e*) See *ante*, p. 69.

(*f*) *Mitchinson v. Hewson* (1797), 7 T. B. 348 ; *Woodman v. Chapman* (1808), 1 Camp. 189.

(*g*) A husband is not liable after the death of his wife under the

Married Women's Property Act, 1874 (37 & 38 Vict. c. 50), or at common law for her ante-nuptial debts (*Bell v. Stocker* (1882), 10 Q. B. D. 129) ; *secus*, under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 14, 15.

(*h*) 56 & 57 Vict. c. 63.

The Act of 1893 providing (sect. 1) that :—

Chap. V.

Every contract hereafter entered into by a married woman otherwise than as agent—

- (a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;
- (b) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and
- (c) Shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to.

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

Prior to the passing of this amending statute it was held, under the repealed sub-sects. 2 and 4 of sect. 1 of the Act of 1882, that property put into settlement upon or after marriage, did not upon discoveriture become liable for contracts made by the widow during her husband's lifetime (*i*). It will doubtless be noted that the cautious terms with which the Act of 1882 endows married women with capacity are preserved in the amending Act of 1893, and suggest that it is the aim of the legislature to construct a new kind of statutory obligation, enabling a married woman indeed to contract debts, but rendering them enforceable only against her separate property, and not against herself as possessor of the property (*k*). It has, however, been decided in a modern case (*l*) that where a married woman administratrix upon being ordered to pay into Court a sum of money belonging to the intestate's estate, and actually in her possession, refused compliance, the Court had jurisdiction to issue an order for attachment against her.

No personal liability.

(*i*) *Beckett v. Tasker* (1887), 19 Q. B. D. 7. As to the restraint on anticipation preserved by the Act of 1893, see *Pelton v. Harrison*, (1891) 2 Q. B. 422.

(*k*) *Turnbull, In re*, (1900) 1 Ch. 180. As to the law before the passing of the Act of 1882, see *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454.

(*l*) *Turnbull, In re*, (1900) 1 Ch. 180.

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Devastavits.

Where, before the passing of the Married Women's Property Act, a married woman was an executrix or administratrix, and the assets were wasted during the coverture, the estate of the husband after his death was chargeable with the devastavit, and the surviving wife was also liable, if the estate of the husband was insufficient (*m*), upon the principle that as the legal personality of the wife became merged and absorbed in the personality of the husband by the mere fact of marriage, all tortious acts (including of course devastavits) committed by her during coverture related back to her husband, she being no more than his agent. Consequently her devastavits became his devastavits, and his property became liable to satisfy her breaches of trust. These liabilities are modified by the 24th section of the Act of 1882 (*n*), which provides that the word "contract" as used in the Act, shall include the acceptance of any trust, or of the office of executrix or administratrix, and that the provisions of the Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage (*o*), and that her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration.

It would, therefore, appear that, when a married woman has since the 31st December, 1882, proved a will, or taken out letters of administration, and has committed a devastavit, she alone will be liable, and not the estate of the husband, unless he has acted or intermeddled in the trust (*p*). There is, however, no power of attachment under sect. 5 of the Debtors Act, 1869, in cases of devastavits committed by married women (*q*), although there

(*m*) *Adair v. Shaw* (1803), 1 Sch. & Lef. 243, where the subject is elaborately discussed by Lord Redesdale. See also *Soady v. Turnbull* (1866), L. R., 1 Ch. 494.

(*n*) 45 & 46 Vict. c. 75.

(*o*) Although no devastavit can be recovered after a lapse of six years (*Gale, In re* (1883), 22 Ch. D.

820), no executor is entitled to set up devastavit as a defence in order to claim the protection of the Statute of Limitations: *Hyatt, In re* (1888), 38 Ch. D. 609.

(*p*) See *In the Goods of Ayres* (1883), 8 P. D. 168.

(*q*) *Scott v. Morley* (1887), 20 Q. B. D. 120, C. A.

is when the money is actually in their possession (*r*). The Court, apparently, distinguishing between a contempt of its jurisdiction and actual inability to replace losses resulting from waste.

After the death of her husband, the widow may be sued alone for all tortious acts in which she participated: whether she was a sole actor in them, or whether they were committed by her at the instigation or under the influence and direction of her husband (*s*).

Liability for
torts.

And in cases where a married woman beneficiary (restrained from anticipation) incites her trustee to commit a devastavit, her separate estate may be impounded in order to recoup him (*t*).

(*r*) *Turnbull, In re*, (1900) 1 Ch. 180.

(*s*) *Vine v. Saunders* (1837), 4 Bing. N. C. 96.

(*t*) Trustee Act, 1893, s. 45; and see *Griffiths v. Hughes*, (1892) 3 Ch. 105; *Bolton v. Curre*, (1895) 1 Ch. 544.

CHAPTER VI.

RIGHTS ARISING FROM THE DISSOLUTION OF THE
MARRIAGE BY THE DEATH OF THE WIFE.

SECTION I.

THE HUSBAND'S RIGHT OF ADMINISTRATION.

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<i>ing an executor</i>	. 152	<i>the death of his Wife.</i>	. 155

Personalty
undisposed of.

As regards personal estate, the husband's rights on the death of his wife seem to have formerly been the same (subject, of course, to the wife's power of alienation) in the case of separate estate as in the case of personalty not settled to her separate use. Thus, cash or bank notes (*a*), and also, it seems, leaseholds (*b*), of the wife passed to the surviving husband without his being bound to take out administration to her estate; while in the case of choses in action, as will be seen later, he could only recover them as her administrator (*c*). If the wife made a will dis-

(*a*) *Molony v. Kennedy* (1839), 10 Sim. 254; *Zugman v. Hopkins* (1842), 4 Man. & Gr. 389; *Johnstone v. Lumb* (1846), 15 Sim. 308; *Bourne v. Fosbrook* (1865), 18 C. B. N. S. 515.

(*b*) See *post*, p. 154.

(*c*) The law on this point is now altered, and it is necessary for the husband to obtain a grant of administration in both cases.

posing of her separate estate, and appointing an executor, it seems that the executor would hold any separate personalty undisposed of, upon trust for her husband (*d*) ; subject, however, to payment of her debts contracted on the faith of her separate estate (*e*). Nor is there, apparently, any thing in the Married Women's Property Acts to deprive the husband of the right to his deceased wife's personal estate. Chap. VI. s. 1.

The marital right is certainly excluded during the coverture, but there is no provision which makes a woman's property devolve as if she were a *feme sole*. Therefore, in default of express enactment, the qualities of "separate property," including its devolution on intestacy, must be regarded as identical with those of property held in trust for the separate use of a married woman under the old law (*f*). The object of the passing of the Married Women's Property Acts being to abolish the disabilities from which a married woman suffered of acquiring, holding and disposing of property during the coverture, and not to affect the devolution of property after its termination.

Before the passing of these Acts the expression "legal representative of a married woman" could only mean her husband, who had taken out letters of administration. Her executors in no sense represented her. They took only such part of her estate as was expressly bequeathed to them, they were not answerable for her ante-nuptial debts, and the grant of probate did not preclude the husband from obtaining letters of administration. He was the only person who could continue the personality which had during life been merged in his own ; and accordingly his right to administration, in the absence of a protection order or a judicial separation, was absolute. Legal personal representative of a married woman.

Nor has modern legislation detracted from this right of the husband in case of an intestacy. Consequently, upon the death of the wife intestate, the Probate Division of the High Court Husband's right of administration.

(*d*) *Smart v. Tranter* (1890), 43 Ch. D. 587.

(*e*) *Owens v. Dickenson* (1840), Cr. & Ph. 48.

(*f*) In several sections of the Act of 1882 "separate property" includes property held on trust for the separate use of a married woman: see sects. 13, 15, 20, 21.

Chap. VI. s. 1. will grant administration of her estate to her husband, and to him alone, unless he renounce or decline it.

Mr. Justice Williams, in his valuable work on Executors and Administrators, lays down the law as follows (*g*) :—

“ This right (the husband's right of administration to the wife) belongs to the husband exclusively of all other persons (*h*); and the Ordinary has no power or election to grant it to any other (*i*). The foundation of this claim has been variously stated: by some it is said to be derived from the statute 31 Edw. 3, on the ground of the husband's being ‘ the next and most lawful friend ’ of his wife (*k*); while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes (*l*). But the right, however founded, is now unquestionable, and is expressly confirmed by the statute 29 Car. 2, c. 3, s. 25, which enacts that the Statute of Distribution (22 & 23 Car. 2, c. 10) ‘ shall not extend to the estates of *femes covert*, that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act.’ ”

Wife's power
of appointing
an executor.

Although the husband was thus entitled to administer to his deceased wife, this right might have been displaced as to separate property by the appointment of an executor by the wife (*m*). But it seems that the probate granted to the executor was always limited to the separate property, and that a *cæterorum* grant would in all cases be made to the husband. Rule 18 of the Non-Contentious Probate Rules, 1887, has, however, altered this procedure (*n*).

(*g*) 10th ed., vol. i. 319, 320.

(*h*) *Humphrey v. Bullen* (1737),
1 Atk. 459.

(*i*) *Sir George Sand's case* (1687),
3 Salk. 22.

(*k*) 3 Salk. 22; *Elliott v. Gurr*
(1812), 2 Phillim. 16.

(*l*) Com. Dig. Administrator (B.
6); *Watt v. Watt* (1796), 3 Ves. 247.
Others have supposed that the husband is entitled, as next of kin to the wife: *Fortre v. Fortre* (1692),
1 Show. 327; *Rex v. Bettesworth* or
Bosworth (1739), 2 Stra. 1111, 1112;
but it seems clear that the husband

is not of kin to his wife at all:
Watt v. Watt (1796), 3 Ves. 244.

(*m*) *Brownrigg v. Pike* (1882), 7
P. D. 61. A will made by a married
woman under a power stood on a
different footing from one which
disposed of separate property. The
former, even when executors were
appointed thereby, was not ad-
mitted to probate: *O'Dwyer v.*
Geare (1859), 1 Sw. & Tr. 465;
In the Goods of Tomlinson (1881),
6 P. D. 209.

(*n*) *In the Goods of Amelia Price*
(1887), 12 P. D. 137; and see
Rule 18, set out at p. 153.

It can scarcely be said that anyone except the husband, or Chap. VI. s. 1. some one administering with his consent, became, previously to the Act of 1882, the personal representative of a married woman. Accordingly, prior to that date, it has been held that the will of a married woman made under a power and appointing executors did not continue the chain of representation from a former will, of which the married woman was executrix (*o*). But if the husband (*p*), or the executor of the married woman with his consent (*q*), supplements the limited probate, by obtaining a grant of administration to the rest of her personal estate, such person will be entitled to take out administration with the will annexed of the unadministered personal estate of the original testator (*r*).

A question of considerable importance was at one time Personal representative of wife since Act of 1882. thought to arise under the Married Women's Property Act, 1882 (*s*), with reference to the husband's right to administration, namely: whether, if a married woman appoints an executor, he is her personal representative to all intents and purposes, so as to displace altogether the husband's right to obtain a grant of administration?

It is, however, now provided by Rule 18 of the Non-Con- Probate Rules, 1887. tentious Probate Rules of 1887, that—

“In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant, or in the oath to lead the same the separate personal estate of the testatrix, or the power or authority under which the will has been or purports to have been made. The probate or letters of administration, with will annexed in such cases, shall take the form of ordinary grants of probate or letters of administration with will annexed without exception or limitation, and issue to an executor or other person authorised in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy” (*t*).

(*o*) *In the Goods of Hughes* (1860),
4 Sw. & Tr. 209.

(*p*) *In the Goods of Martin* (1862),
3 Sw. & Tr. 1.

(*q*) *In the Goods of Richards* (1866),
L. R., 1 P. & D. 156.

(*r*) *In the Goods of Ditchfield*
(1870), L. R., 2 P. & D. 152; *In the Goods of Bridger* (1878), 4
P. D. 77.

(*s*) 45 & 46 Vict. c. 75.

(*t*) And see *In the Goods of Amelia Price* (1887), 12 P. D. 137.

Chap. VI. s. 1. The effect of general probate is, however, only to enable the executor to get in all the assets of the wife, whether she had power to dispose of them by will or not, without enhancing the power of ultimate disposition.

The executor being no more than a trustee to the husband for all assets to which he may be beneficially entitled (*u*).

Closely connected with the subject of administration is the further question—whether the beneficial interest in the wife's property, with respect to which she may have died intestate, has been to any extent affected in its devolution by the Married Women's Property Act, 1882? This question is discussed on a subsequent page, and reference to it is made here merely for the purpose of guarding against the supposition that modern legislation has necessarily altered the old law (*x*).

It would appear that under the old law it was only where there were choses in action of the wife unrecovered at her death, or chattels real belonging to her which were not vested in his possession in her right in her lifetime, that the husband could gain any object by taking out administration to her (*y*). For formerly all her other personal property passed to the husband by virtue of the marriage—that is, *jure mariti*. So that even where the wife's property consisted of a vested reversionary interest in leaseholds subject to a life estate, and she predeceased her husband during the subsistence of the life estate, it was not necessary for the husband to take out administration to her in order to complete his title to the property (*z*). And this rule as to the acquisition of property *jure mariti* by the husband, without the need of administration, is apparently applicable, in cases of this description, whenever a woman married before, has died after, the passing of the Married Women's Property Act, 1882. But as the husband in such case takes the property as the legal representative, and as standing in the shoes of his deceased wife, he only acquires it (by virtue of the provisions of sect. 23 of the

(*u*) *Smart v. Tranter* (1890), 43 ed. pp. 528, 640.
Ch. D. 587, C. A.

(*x*) See *post*, p. 155.

(*y*) *Williams on Executors*, 10th

(*z*) *Re Bellamy* (1883), 25 Ch. D.
620.

Act of 1882) subject to the same liabilities as she would be subject to if living (a). Chap. VI. s. 1.

It should be noted that the reversionary interest of a woman married before the Act falling into possession after the passing of the Act does not become her separate estate by virtue of sect. 5 of the Married Women's Property Act, 1882 (b).

On the death of the wife, her choses in action not reduced into possession belonged to the surviving husband, but in order to recover them, it was necessary that he should take out administration to her estate. This would seem to be still the law in all cases of the death of a married woman intestate, where the choses in action have not been disposed of by her. Where a female creditor having taken out administration to her deceased debtor, married and died without having appropriated a fund for the payment of her own debt, it was held that the husband was not entitled in his own right as a creditor, but only as the representative of his wife (c); and after the death of the surviving husband a double administration is necessary before recovering the outstanding chose in action (d).

The character in which the husband was entitled to the property of his deceased wife was not affected by its being settled to her separate use. If such property was stock or any other chose in action, the husband could, of course, recover it only as administrator (e); if it was such that, except for the separate use, it would have vested in him *jure mariti*, he was entitled after her death to recover it without taking out letters of administration, because "the quality of separate property ceased at her death" (f).

Although by the Married Women's Property Act, 1882, the marital right during the coverture has been abolished, yet those rights of the husband, which arise on the death of the wife, do not seem to be affected by it. The enactment before referred

(a) *Surman v. Wharton*, (1891) 1 Q. B. 491.

(b) *Reid v. Reid* (1886), 31 Ch. D. 402, C. A.; overruling *Baynton v. Collins*, 27 Ch. D. 604.

(c) *In the Goods of Risdon* (1869), L. R., 1 P. & D. 637.

(d) *In the Goods of M. A. Harding* (1872), L. R., 2 P. & D. 394.

(e) *Proudley v. Fielder* (1833), 2 My. & K. 57.

(f) *Johnstone v. Lumb* (1846), 10 Jur. 699; *Molony v. Kennedy* (1839), 10 Sim. 254.

Chap. VI. s. 1. to (the Statute of Frauds, 29 Car. 2, c. 3, s. 25) has not been repealed, and therefore the husband's right to administration is not taken away; and the only result seems to be that the husband must now in all cases take out letters of administration to his wife.

It has been suggested that property received by the husband in this his representative character, as administrator of his wife, was liable to her debts; whereas property acquired by him *jure mariti* was his absolutely. But this artificial distinction has now ceased to have any practical operation; for, since the 31st December, 1882, no property of the wife can be acquired by the husband during the coverture *jure mariti*, except in the few cases where the title has accrued before that date; and any property of the wife which may pass at her death to her husband will now reach his hands subject to the same liability for her debts as it was subject to during her life (*g*).

If the wife be executrix to another and dies intestate, then, as to the goods which she had in that capacity, administration must not be granted, generally speaking, to her husband (*h*); but in order to constitute a personal representative of the original testator administration *de bonis non* must be taken out with his will annexed (*i*).

Where a wife has obtained a protection order under the 20 & 21 Vict. c. 85, s. 21, and afterwards dies in the lifetime of her husband, intestate, the Court will decree administration, limited to such personal property as she acquired since the desertion, to the next of kin of the wife, and not to the husband, the 25th section of the Act having expressly provided that on the death of the wife such property "shall go as if her husband had been then dead" (*k*).

(*g*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(*h*) Williams on Executors, 10th ed. p. 325; *Smith v. Jones* (1811), Bulst. 44; *Jones v. Roe* (1832), W. Jones, 175; *Anon.*, 3 Salk. 21.

(*i*) *In the Goods of Ditchfield* (1870), L. R., 2 P. & D. 152; *In the Goods of Bridger* (1878), 4 P. D.

77.

(*k*) *In the Goods of Worman* (1859), 1 Sw. & Tr. 513; *In the Goods of Faraday* (1861), 2 Sw. & Tr. 369; *In the Goods of Stephenson* (1866), L. R., 1 P. & D. 287; *Mudge v. Adams* (1881), 6 P. D. 54. As to rule when the husband is bankrupt, see *In the Goods of Turner*

SECTION II.

HUSBAND'S RIGHT TO ARREARS OF RENT OF WIFE'S ESTATE.

Before the 32 Hen. 8, c. 37, if a husband did not, during the coverture, recover arrears of rent which had become due to his wife before the marriage, he could not after her death compel payment of them. This was an inconvenience; and was remedied by that Act, which gave the husband and his executors and administrators an action of debt for such arrears, with liberty to distrain for the same in like manner and form as if his wife were still living (*l*). This has ceased to be of any importance, as, since the Married Women's Property Act, 1882 (*m*), the husband takes no interest in his wife's real estate during the coverture.

SECTION III.

TITLE BY THE CURTESY.

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Curtesy was undoubtedly, in its feudal origin, the continuation after the wife's death of the inchoate right acquired by the

(1886), 12 P. D. 18; upon separation by deed, see *In the Goods of Moore*, (1891) P. 299; see also, in certain other cases, Williams on Executors, 10th ed. pp. 321, 322.

(*l*) Co. Litt. 351, b; Com. Dig., 4th ed., tit. "Bar. and Fem.," p. 84; 1 Rep. 206; *Howe v. Scarrott* (1859), 4 H. & N. 723.

(*m*) 45 & 46 Vict. c. 75.

Chap. VI. s. 3. coverture, and accordingly it seems a violation of principle that, in the case of an estate settled upon the wife for her separate use, where there could be no such inchoate right, the husband's curtesy should arise like a life estate in remainder expectant upon the death of the wife.

The law, however, on this point may be regarded as settled, and disposes of any argument which might otherwise have been adduced against the husband's curtesy in separate property under the provisions of the Married Women's Property Acts (*n*).

Curtesy initiate.

On the birth of issue capable of inheriting the wife's real property, the husband, as the father of such issue, acquires, in his own right, an estate for life, called tenancy by the curtesy initiate; which estate, however, does not become consummate till the death of the wife.

Though incident to the birth of inheriting issue, not liable to be defeated by the death of such issue.

Tenancy by the curtesy initiate, though thus called into being by the birth of issue capable of inheriting, is not liable to be determined by the death of such issue, or even by such issue attaining majority.

On the death of the wife the husband becomes tenant by the curtesy, or, as Littleton says: "tenant by the curtesy of *England*, because this is used in no other realm, but in *England* only" (*o*).

Requisites of tenancy by the curtesy.

Four things are requisite in order to give rise to a tenancy by the curtesy, namely, marriage, seisin of the wife, issue who might inherit the land (*p*), and the death of the wife (*q*). Of these, the seisin of the wife is the only one which calls for observation.

Seisin of the wife.

The seisin must be an actual seisin when attainable; but if, from the circumstances of the case, possession is not possible, a seisin in law is sufficient (*r*). Thus, if a rent in fee descends

(*n*) As to the husband's title by the curtesy in the undisposed of real estate of his wife, see *Hope v. Hope*, (1892) 2 Ch. 336.

(*o*) Litt. § 35. Littleton's statement that the custom was peculiar to *England* is incorrect. It existed at an early period both in *Germany* and in *France*, and was probably in its present form introduced by the

Normans. See Digby's *History of the Law of Real Property*, 5th ed. p. 174.

(*p*) By the custom of gavelkind birth of issue who might inherit is not necessary: Co. Litt. 30, a.

(*q*) Co. Litt. 30, a; Stephen's *Comm.*, 14th ed. Vol. 1, p. 151.

(*r*) Co. Litt. 29, a; and see as to the difference between seisin in law

to a married woman who dies before any payment falls due, the husband shall be tenant by the curtesy, although his wife had but a seisin in law, because, says Lord Coke, "he could by no industry attain to any other seisin, *et impotentia excusat legem*" (s). Chap. VI. s. 3.

The doctrine of seisin at law received in a modern case (t) a remarkable extension, for it was there held that the husband was entitled as tenant by the curtesy of an estate devised to his wife by her father, although she died in the testator's lifetime, and her existence was artificially continued by the 33rd section of the Wills Act, so as to prevent a lapse.

The following statement of the law is taken from the judgment of Sir G. Jessel, M. R. :—

"Now, I consider it as settled law that, as a general rule, the husband could not take an estate by the curtesy in property which was the fee simple of the wife in possession, unless there had been an entry, or something equivalent to an entry—that is, a reception of rent to entitle the wife to be described as being seised in fee of the property. If it descended to the wife, for instance, and the husband did not enter in her right before her death, the husband did not get an estate by the curtesy; but, though that was settled law, there was a reason for the law—it was considered to be the husband's own fault for not entering. He had an estate during the coverture, and he had not taken due advantage of his opportunities of becoming seised; and, when he could not become seised from the nature of the estate, a seisin in law was sufficient, and he was not therefore deprived of his estate by the curtesy, because he could not possibly have obtained a legal [*sic*] seisin by any act of his own" (u).

The seisin must also be sole; if the wife is a joint tenant the husband will not be entitled; *secus*, where she is a tenant in common, for then she is solely seised of an undivided share. Where, however, an owner in possession of lands, under a fee farm grant, granted them by deed to his two daughters as tenants in common, who subsequently brought ejectment against him to recover the lands, but by consent (judgment being entered for them) allowed stay of execution during the lifetime of the grantor, it was held, upon the death of one tenant

and seisin in deed, *Leach v. Jay* (t) *Eager v. Furnivall* (1881), 17 (1877-8), 6 Ch. D. 496; 9 Ch. D. Ch. D. 115.

42.

(u) (1881), 17 Ch. D. 119.

(s) Co. Litt. 29, a.

Chap. VI. s. 3. (who predeceased her father) that her husband acquired no tenancy by the curtesy, a consent judgment constituting no sufficient actual seisin (*x*).

Interest must
be in posses-
sion.

Her interest must also be in possession, "a man shall not be tenant by the curtesy of a remainder or reversion" (*y*). The inchoate right to curtesy does not attach till the wife becomes entitled to an estate of inheritance in possession; and, accordingly, it has been held (*z*) that, "where the wife's real estate did not fall into possession till after the husband's bankruptcy and discharge, the husband, though there had been issue of the marriage, had not, at the time of his bankruptcy, any such contingent interest in the estate as would pass to his assignees."

Curtesy out
of estates for
separate use.

It was said by Sir G. Jessel, M. R., that :—

"In the case of a husband, this being a devise of legal estate, with a superadded direction as to separate use which does not affect the devise of the legal estate, the husband would take under his legal rights without those legal rights being cut down by the superadded direction as to separate use" (*a*).

It may be considered as settled that, where a married woman was entitled to an equitable estate of inheritance to her separate use, and did not dispose of it by deed or will, her husband became, on her death, tenant by the curtesy (*b*); whether the legal estate was vested in trustees, or in the husband, in right of or as a trustee for his wife, equity, following the law, held the husband "to be entitled to curtesy out of the wife's equitable estate." Consequently the various incidents attendant upon the husband's title by the curtesy arise as well in equitable as in legal estates, and whether the wife is entitled for her separate use or not (*c*).

(*x*) *Parks v. Hegan*, (1903) 2 Ir. R. 643.

(*y*) 2 Black. Comm. 127.

(*z*) *Gibbins v. Eyden* (1869), L. R., 7 Eq. 371.

(*a*) Per Sir G. Jessel, M. R., in *Eager v. Furnivall* (1881), 17 Ch. D. 119.

(*b*) *Roberts v. Dizwell* (1738), 1 Atk. 607; *Morgan v. Morgan* (1820),

5 Mad. 408; *Follett v. Tyrer* (1844), 14 Sim. 125; *Appleton v. Rowley* (1869), L. R., 8 Eq. 139; *Cooper v. Macdonald* (1877), 7 Ch. D. 288, C. A., overruling the inconsistent cases of *Hearle v. Greenbank* (1749), 3 Atk. 696, 715; and *Moore v. Webster* (1866), L. R., 3 Eq. 267.

(*c*) *Lambert's Estate, In re* (1888), 39 Ch. D. 626.

It was at one time considered doubtful whether the separate property of a married woman, under the Married Women's Property Act, 1882, is liable to all the same incidents, including curtesy, as property settled to her separate use under the law prior to that Act. Chap. VI. s. 3.

But it has now been decided, as already stated, that notwithstanding the provisions of sect. 1, sub-sect. 1, and sect. 5 of the Married Women's Property Act, 1882, a husband is still entitled, on the death of his wife, to an estate by the curtesy in her undisposed-of real property (*d*). Curtesy since Act of 1882.

A tenant by the curtesy has all the rights and liabilities of an ordinary tenant for life, and he is expressly empowered by the Settled Estates Act, 1877 (*e*), to grant leases for twenty-one years, subject to the conditions specified in the Act; and by the Settled Land Act, 1882 (*f*), all the large powers conferred thereby upon tenants for life are attributed to tenants by the curtesy. It is further enacted by the Settled Land Act, 1884 (*g*), that—"For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife." Powers of tenant by the curtesy.

In Ireland the estate of tenant by the curtesy is, however, abolished as regards "registered freehold lands" under the Purchase of Land Acts by 54 & 55 Vict. c. 66, s. 85.

(*d*) *Hope v. Hope*, (1892) 2 Ch. 336.

(*f*) 45 & 46 Vict. c. 38, s. 58; and see *Mogridge v. Clapp*, (1892) 3 Ch. 382.

(*e*) 40 & 41 Vict. c. 18, s. 46.

(*g*) 47 & 48 Vict. c. 18, s. 8.

CHAPTER VII.

LIABILITIES ARISING FROM THE DISSOLUTION OF
THE MARRIAGE BY THE DEATH OF THE WIFE.**Husband's
liabilities.**

A HUSBAND is legally bound to bury his deceased wife (*a*), and is liable to a stranger who has paid the expenses of her funeral, the same having been suitable to the rank and fortune of her husband (*b*).

An infant husband can contract for the funeral of his deceased wife (*c*).

If the debts of the wife contracted *dum sola* are not enforced during her coverture, the husband was not, prior to the Act of 1882, liable for them after her death (*d*); but now he is liable to the extent of all property he may acquire through her (*e*).

(*a*) *Bradshaw v. Beard* (1862), 31 P.Wms. 409; *Lewis v. Nangle* (1752), Law J., C. P. 273. Amb. 150.

(*b*) *Jenkins v. Tucker* (1788), 1 (*d*) *Bell v. Stocker* (1882), 10 H. Black. 91. Q. B. D. 129.

(*c*) *Heard v. Stanford* (1735), 3 (*e*) 45 & 46 Vict. c. 75, ss. 14, 15.

CHAPTER VIII.

RIGHTS ARISING FROM THE DISSOLUTION OF THE
MARRIAGE BY DIVORCE, OR BY THE JUDICIAL
SEPARATION OF HUSBAND AND WIFE (a).

SECTION I.

THE LAW OF DIVORCE.

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IN the Catholic ages marriage was considered a sacrament. Consequently no human authority could rescind it, unless, perhaps, the Pope, as God's vicegerent upon earth, had the power of dissolution—a power which he but rarely, if ever, exercised. The law of divorce, therefore, in this island, as in the rest of

The ancient ecclesiastical doctrine of the indissolubility of marriage.

(a) The opening portion of this chapter as printed in the first edition of this work (published in 1849) has, with some few trifling alterations, been retained, since it may

still be of some historical interest, though no longer having any practical bearing on the present law of divorce.

Ch. VIII. s. 1. Europe, acknowledged throughout the cardinal doctrine of indissolubility. This doctrine of the sacramental character of marriage, with its necessary concomitant of indissolubility was, however, subsequently to the assumption by the monarchs of England of sovereignty over the Church, expressly denied; the 25th of the Articles of Religion of the Church of England (as ratified for the second time by Queen Elizabeth in 1571) stating that matrimony is not to be accounted a Sacrament of the Gospel.

To set aside a marriage in pre-Reformation times, proof must have been given that the contract itself was invalid. Conjugal infidelity furnished a ground for separation. But nothing short of death could release the nuptial bond. The course, therefore, was to assert some obstructing, antecedent impediment, as a previous betrothment, undue consanguinity or affinity, physical incompetence or mental incapacity. Any one of these points established, the marriage was thereupon declared null *ab initio*. But if originally valid, it was, under all circumstances, positively and absolutely indissoluble. The hardship of such a state of things would have been great, or rather, would have been intolerable, were not the Catholic tribunals, we are well assured, in general very liberal and indulgent in their construction of legal impediments to matrimony. Every one knows how much it was the policy of the Roman Church to multiply these impediments; the power of dispensation having been for many centuries a fruitful source of ecclesiastical revenue. To this end the spiritual lawyers—the canonists—invented many ingenious fictions, distinctions, and refinements, which made it in most instances no very difficult matter to annul a marriage. The most remarkable of all their contrivances in this kind was that by means of which the legitimate impediments of consanguinity and affinity were extended to an almost ludicrous extreme. For not only did they forbid marriage with a seventh cousin, but they held that the relation of affinity might be contracted by mere commerce between the sexes. And having once established this position, they deduced from it many startling conclusions. Thus, if a man had carnally known one sister, it would have been incest in him to marry or to have sexual intercourse with

Maxims of the
canonists.

the other sister, or even with any of her relations to the seventh degree; because, said the canonists, an affinity resulted from the commerce with the first sister, which affected all her relatives standing within the scope of the seven prescribed degrees. Fornication, therefore, according to these authorities, was as much the creator of affinity as matrimony itself. In proof of which assertion we may refer to the notable case of Margaret, widow of James IV. of Scotland (*b*), who, after the king's death, having intermarried with Lord Methven, attempted to get rid of that nobleman by a sentence of the Ecclesiastical Court, on the ground that before the marriage she had been (as the record expresses it) *carналiter cognita* by her husband's eighth cousin (*c*), the Earl of Angus. And to the same effect is the case of Henry VIII. and Anne Boleyn. For when the father of the English Reformation invoked the aid of the Spiritual Court to divorce his second wife, he did so, not on the ground of her alleged adulteries, but on the ground of two distinct canonical impediments, namely, her pre-contract with Northumberland, and his own pre-intercourse with her sister Mary, whom, we are told by Catholic writers, the first Defender of the Faith had maintained for years as his concubine. Attempts have been made to vindicate Henry from this stain upon his memory. The story of his connection with Mary Boleyn is denied by all good Protestants. But whether true or false, it serves to throw light upon the point now under consideration; and shows that the institutions of the canon lawyers ministered well to the passions of any husband who might happen to combine the characteristics of a libertine and a tyrant. In fact, parties who sighed for their liberty did not often, in those days, sigh in vain; for wherever a marriage became hateful to one or other, or both, of the spouses, the canonists rarely failed to demonstrate that it was invalid; the only proof required by the Court being the mere confession of the parties (*d*). Yet these impediments, with

Ch. VIII. s. 1.

Facility of
divorce by the
canon law.

(*b*) Riddell's Scots' Peerage Law, p. 187.

(*c*) Quarterly Review, June, 1851.

(*d*) The statute 32 Hen. 8, c. 38, speaking of the canonistic devices, states in its recital, "that no marriage could be so surely knit and bounden, but it should lie in either

Ch. VIII. s. 1. the long train of sublimated subtleties which attended them, were not always oppressive to the laity. They were occasionally found to be a real accommodation and convenience. Thus, in cases of adultery, the injured party had no more stringent remedy than divorce *à mensâ et thoro*—a sort of insult rather than a satisfaction to any man of ordinary feelings and understanding. But if by the fertile exercise of canonical ingenuity some ante-nuptial disability could be suggested, complete redress would be given; for the contract would be pronounced invalid, and both parties would then have their freedom. The labours of the canonists, therefore, in this department, ought not to be the subject of indiscriminating censure, since, by means of them, the community was in a great degree relieved from the severe and unbearable consequences, which would otherwise have sprung from an undeviating adherence to the iron doctrine of indissolubility.

Such was, and perhaps still continues to be, the Roman Catholic system of divorce *à vinculo matrimonii*; a system objectionable and mischievous in many ways, but chiefly so in this, that it almost invariably did something essentially different from that which it professed to do. For while the true object in most cases was to *rescind*, the avowed object in all was to *annul* the matrimonial contract; thus effecting covertly and indirectly a purpose which, when sought on proper grounds, required no disguise, being at once reasonable in itself, and unequivocally permitted, if not actually enjoined, by Divine authority.

At the Reformation, doctrine of indissolubility abandoned.

At the Reformation, marriage ceased to be regarded as a sacrament, and the doctrine of indissolubility fell speedily to the ground. It had, in fact, no support either in the Old Testament or in the New. The restrictions of consanguinity and affinity, when pushed to the absurd extreme which has just been pointed out, were likewise found to be unwarranted by anything contained in the Sacred Writings. And it was agreed that there ought to be no prohibition of matrimony beyond the limits of

of the parties' power to prove a pre-contract, a kindred and alliance, or a carnal knowledge, to defeat the same."

God's law, as unfolded in the 18th chapter of Leviticus; while, Ch. VIII. s. 1. on the other hand, all marriages *within* those sacred boundaries were adjudged incestuous and illegal, and utterly above the reach of ecclesiastical dispensation (*e*).

In this state of public opinion, it became necessary to institute a general revision of our ecclesiastical code, with which Revision of
our ecclesi-
astical code. view an Act was passed in 1533 (*f*), authorizing Henry VIII. to appoint commissioners with very extensive powers, who, in conjunction with the royal theologian himself, were to revise and rectify the entire body of the canon law, in so far as operative within the realm. The same Act was apparently renewed about two years afterwards (*g*); and in 1543 a further statute (*h*) was passed for the purpose of giving the commissioners still larger powers of reform and amendment. Similar endeavours were likewise made in the following reign (*i*), Edward VI. being full of zeal and ardour in the cause, but his premature death occasioned its suspension; for although the consideration of the subject was resumed in 1 Eliz., when a Bill was introduced to renew the appointment of commissioners, the measure was dropped on the second reading in the House of Commons, and, as we learn from Burnet, was not again revived (*k*). The commissioners, however, prepared an elaborate report, embodying therein a new code of ecclesiastical laws, and the work was subsequently published under the title of "*Reformatio Legum Ecclesiasticarum*," a document rendered venerable by the learning and piety of its framers, who drew it up not in the hasty spirit of experimental innovation, but after a calm and deliberate scrutiny of more than twenty years. An important chapter of the new work was devoted to the subject of divorce, as to which it contained a variety of minute regulations. Suffice it for the purposes of our present argument to say that the "*Reformatio Legum*" authorized divorce *à vinculo* in cases of adultery, malicious desertion, and mortal enmities; and it abrogated entirely the inferior remedy of divorce *à mensa et thoro*.

(*e*) 32 Hen. 8, c. 38.

(*i*) 3 & 4 Edw. 6, c. 11.

(*f*) 25 Hen. 8, c. 19, s. 2.

(*k*) History of the Reformation,

(*g*) 27 Hen. 8, c. 15.

vol. ii. p. 791.

(*h*) 35 Hen. 8, c. 16.

CH. VIII. s. 1. This code, it is true, had not the legislative sanction to make it the law of the land. But although not of actual binding obligation, it must have had great weight as expressing the opinion of the Reformed Church upon a question then regarded as purely ecclesiastical. Thus Sir John Stoddart, an eminent master of the canon law, informs us "that from about the year 1550 to the year 1602, marriage was not held by the Church, and therefore was not held by the law, to be indissoluble" (1).

Marquis of
Northampton's case.

In proof of this position we have in the year 1548 the famous case of Parr, Marquis of Northampton (m), where it was held by a commission of delegates that the mere act of adultery of itself dissolved the nuptial tie; and that a sentence of divorce by the Ecclesiastical Court following thereon (even although purporting to be only *à mensâ et thoro*) enabled the injured husband to marry again, living his guilty wife. It is unnecessary to state here the particulars of that celebrated and well-considered precedent. But the principle to be derived from it is this,—that where you have, by sentence of divorce issuing from a court of competent jurisdiction, a judicial ascertainment of adultery, not only is the nuptial tie rescinded, but the injured party is immediately at liberty to contract a second marriage. This may be taken to have been the opinion of the Church at all events; and that opinion was probably acted upon by the laity. It does not, however, appear that the Ecclesiastical Courts gave sentences of express dissolution. They seem rather to have adhered to their ancient form of judgment; they only divorced *à mensâ et thoro*. But in whatever shape their decrees were pronounced, the community, in cases of adultery, relied upon them as justifying a second act of matrimony. This being the case, we find that towards the close of the reign of Elizabeth, certain important ordinances were enacted by the Chamber of Convocation. These, though now more or less forgotten or lost sight of, were passed with great solemnity and confirmed by the Queen. They were subsequently known as

(1) See Minutes of Evidence taken before the Lords' Committee on the Privy Council Bill, Session 1844.

(m) Burnet's Reformation, vol. ii. p. 115.

the Ecclesiastical Constitutions of 1597. One of these ordinances, the 105th canon, was in the following terms :— Ch. VIII. s. 1.

Forasmuch as matrimonial causes have been always reputed among the weightiest, and therefore require the greatest caution when they come to be handled and debated in judgment, especially in causes wherein matrimony is required to be *dissolved* or *annulled*; we strictly charge and enjoin that in all proceedings in *divorce*, and *nullities of marriage*, good circumspection and advice be used, and that the truth may, as far as possible, be sifted out by the depositions of witnesses and other lawful proofs; and that credit be not given to the sole confessions of the parties themselves, howsoever taken upon oath either within or without the Court. Ordinances of Convocation in 1597.

Here, then, the process of *dissolving*, and the process of *annulling* matrimony, are plainly discriminated as separate remedies then existing in the Spiritual Courts. The words seem to admit of no other construction. They refer to the *dissolving* divorce, and to the *nullifying* divorce, as proceedings in themselves altogether distinct, substantive, and independent. Another canon, the 107th, passed on the same occasion, having nothing to do with dissolving or nullifying divorces, lays down the following regulation as to divorce *à mensâ et thoro* :—

In all sentences pronounced only for divorce and separation *à thoro et mensâ*, there shall be a caution and restraint inserted in the said sentence, that the parties so separated shall live chastely, and neither shall they, during each other's life, contract matrimony with other person. And for the better observance of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same shall have given good and sufficient caution and security unto the Court, that they will not any way break or transgress the said restraint or prohibition.

In the year 1597, therefore, it still continued to be the opinion of the Church of England, that upon a divorce for adultery, even though only *à mensâ et thoro*, the parties might marry again. The very fact of enjoining a prohibitory bond implies that the marriage, which the bond was intended to prevent, would have been valid. The learned and judicious Dr. Hammond lays it down with great clearness that “requiring a bond does infer that this marriage, after a Christian divorce, is not looked on by the Church as an adulterous commission, but rather as a matter of dangerous consequence.” And this cer- Prohibitory bond.

Ch. VIII. s. 1. tainly was the prevailing sentiment of our ablest divines of the seventeenth century. Besides, the authors of the canon would not have designated such a connection by the name of matrimony, unless they had held it really entitled to that appellation.

The 107th canon, however, seems to have gone an unwarrantable length in prohibiting such engagements. Bishop Cozens contends that this part of the canon is illegal; and Dr. Hammond is of the same opinion, though he does not express himself so decidedly.

But while the Church of England, as a body, thus disclaimed the doctrine of indissolubility, it is probable that sundry individual ecclesiastics adhered to the old opinion. Thus Whitgift, who was Primate from 1583 to 1603, having called before him certain *sage divines and civilians*, put to them this question,—“Whether, after divorce, it were lawful for a man to marry again, his first wife being still alive?” To which they responded in the *negative*; whereupon, the archbishop being a member of the Court of Star Chamber, it was contrived soon afterwards, in 1602, to bring before that tribunal the case of *Rye v. Foljambe*. There it appears that Foljambe, having been divorced for adultery, married a second time, living his first wife; and it was held that the second marriage was void, “because,” according to the report of Moore (n), “the first divorce was but *à mensâ et thoro*, and not *à vinculo matrimonii*; and John Whitgift, then Archbishop of Canterbury, said that he had called to him at Lambeth the most wise divines and civilians, who all agreed in this.” Now of this determination some may think it enough to say that it was a “Star Chamber matter.” It was a direct contradiction of the “*Reformatio Legum*,” of the Marquis of Northampton’s case, and of the Ecclesiastical Constitutions of 1597. It was also opposed to the practice of the laity for at least half a century. Accordingly, Mr. Serjeant Salkeld, in his note upon the case (o), says that “in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery, the parties might marry again. But in *Foljambe’s*

Rye v.
Foljambe.

(n) (1602), P. 683.

(o) 3 Salk. 138.

case, anno 44 Eliz., in the Star Chamber, *that opinion was changed.*" So that the decision appears to have had all the characteristics of an arbitrary exercise of power by a tribunal which, in fact, had no legal jurisdiction over the subject-matter; a tribunal, too, which, for its tyrannical excesses, was, in a few years afterwards, swept away by an indignant Parliament (*p*).

The decision in *Foljambe's case* was not assented to by the Church of England; for the Chamber of Convocation, its popular parliament, in the succeeding year, re-enacted, word for word, the Ecclesiastical Constitutions of 1597; and these, as subsequently confirmed by James I., became the well-known canons of 1603. In the following year, 1604, the Statute of Bigamy (1 Jac. 1, c. 11) was passed by the legislature, making the offence felony; but containing an express proviso that the Act should "not extend to any person divorced by sentence of the Ecclesiastical Court." For the legislature, we may well believe, did not intend to make that a felony which had so often received the sanction of competent authorities, which had been approved as legal by the delegates in 1548, and which had been twice confirmed as valid by the Chamber of Convocation; once in 1597, and again in 1603.

Ordinances of
Convocation
in 1603.

How far the conduct of the laity may have been affected by these proceedings it is difficult now to conjecture. What particular rule respecting second marriages was followed in the reign of James I., or in that of his son, or during the time of the Commonwealth, we know not. Mr. Spence, indeed, in his work on Equitable Jurisdiction (*q*), suggests it as "not unlikely" that the Court of Chancery decreed divorces *à vinculo matrimonii*; and upon that surmise builds another, namely, that the American courts of equity carried over with them from England their now existing practice of dissolving marriage contracts. With great respect for Mr. Spence, it must be observed, that both these speculations seem groundless. As to

Whether di-
vorces were
ever decreed
in Chancery.

(*p*) "A court, the very name whereof is sufficient to blast all precedents brought from it." Per Yates, J., in the case of *Millar v. Taylor* (1769), 4 Burr. 2303.
(*q*) Vol. i. p. 702.

Ch. VIII. s. 1. what was anciently done by the clerical chancellors, there is no evidence that any of them, as chancellors, ever meddled with the marriage contract. If the proposition had been advanced respecting the Privy Council, or Court of Star Chamber, there would have been more colour for it. But as to the Court of Chancery, there is nothing to support the fabric of Mr. Spence, except two obscure entries in Tothill's Reports (*r*), referable to the time of Lord Ellesmere, and occurring near the close of Queen Elizabeth's reign. The cases there mentioned, however, are cases of divorce *à mensâ et thoro*, and not *à vinculo matrimonii*. This has been ascertained on an examination of the proceedings which are still extant in the Rolls Office (*s*). In the Life of Sir Leoline Jenkins (*t*), notice is taken of "Pierrepoint's petition to the Lord Keeper for a commission to dissolve a marriage." But this seems to have been a mere experiment made shortly after the Restoration, and before the government was settled. It came to no result further than that the Lord Keeper ordered a reference (probably to Sir Leoline Jenkins himself), and, upon a report, the matter dropped.

Divorce could not be had after death of parties.

As we are on this subject it may be as well to observe in passing, that, according to one great authority, sentences of divorce could in no case be had after the death of the parties; neither after the death of the husband, though the wife should be alive, nor after the death of the wife, though the husband should be alive (*u*). On the other hand, however, Coke states that, "if the wife be taken away, and after be divorced, or if shee die, yet the husband shall have his action" (*x*).

But to resume our recital: we are, in the reign of Charles II., enabled to lay our finger upon a case which shows that so far down as the year 1669, the only obstacle which was considered an insuperable impediment to a second marriage after sentence of divorce *à mensâ et thoro* for adultery, was the bond in the

(*r*) Ed. 1649, p. 61; ed. 1671, p. 124.

avocations led to his making the inquiry.

(*t*) Vol. ii. p. 723.

(*s*) This information is due to the kindness of Mr. Busk, of the Chancery bar, whose professional

(*u*) Com. Dig., tit. "Bar. & Fem." (c. 6).

(*x*) 2 Inst. 434.

Ecclesiastical Court; which, however, could have been binding upon *one* only of the parties. The case to which reference is made is that of Lord Roos, which has been usually considered as furnishing the first example of a parliamentary divorce; whereas it was a bill brought in merely to be relieved from the restraint and prohibition of the Ecclesiastical Court. The facts were shortly these: In the year 1666, an Act was passed bastardizing the children of Lady Anne Roos, by reason of her adultery; whereupon her husband, Lord Roos, followed up this proceeding by obtaining from the Spiritual Court a sentence of divorce *à mensâ et thoro*, upon the usual condition of not marrying again in his wife's lifetime, for which he gave security as required by the canon. In this situation, being the next heir to the Rutland peerage, he was advised, that, although his marriage was rescinded, he had still to get rid of his bond or recognizance. No other way seemed so proper or sufficient for this purpose as an Act of Parliament. Accordingly a bill was brought in, entitled "An Act for Lord Roos to marry again." This, therefore, was not a divorce bill. It did no more than simply enable Lord Roos to contract a second marriage, the canon and the bond notwithstanding (y).

Ch. VIII. s. 1.

The case is principally interesting and important as constituting a distinct legislative negation of the doctrine of indissolubility. The difference between it and the case of the Marquis of Northampton was this: The Marquis was barred by no restraint from marrying another wife immediately after the sentence; whereas Lord Roos was prevented from doing so by the canon and the bond, from the binding cogency of which it was the sole object of the bill to relieve him.

The first genuine example of a dissolution of the nuptial tie by Parliament was in the case of the notorious mother of Richard Savage, the poet—the Countess of Macclesfield. There the aid of the legislature was sought, because, in consequence of the skilful opposition set up by the Countess in the Spiritual Courts, and the narrow, antiquated maxims which there pre-

First case of
parliamentary
divorce.

(y) A copy of the bill in Lord Roos's case, procured from the Parliament Office, is given at length in an article of Mr. Macqueen's on "Divorce" in the *Law Review* of February, 1845.

Ch. VIII. s. 1. vailed, she contrived to baffle all her husband's efforts to obtain a sentence of divorce *à mensâ et thoro*. The circumstances of the case, however, were so scandalous and flagrant, that it would have been an outrage upon every principle of justice to withhold relief. Accordingly, the bill of Lord Macclesfield made its way through Parliament in 1697, unembarrassed by any other opposition than some feeble expressions of dissent on the part of the Roman Catholic members.

Second case. The next instance of a legislative dissolution of marriage was in the Duke of Norfolk's case. There also a sentence of divorce was refused by the Ecclesiastical Court, although the Duke tried the experiment more than once. He, however, recovered damages at law from the adulterer, Sir John Jermayne. And after this bill had been repeatedly rejected by the Lords, it became at last successful in 1700. And this brings us to the

Case of Box. case of Box, in 1701, which may be pronounced the earliest specimen of a dissolving statute passed by the legislature, after sentence of divorce in the Ecclesiastical Court. To this era, therefore, is to be referred the commencement of the system of parliamentary divorce, which, though not so old as generally fancied, has still a respectable antiquity.

The petition of Mr. Box, as entered in the Lords' Journal of February 19th, 1700, prays that he may have "leave to bring in a Bill to dissolve his marriage with Elizabeth Eyre, she having lived in adultery, as he hath fully proved in the Court of King's Bench, and obtained a definitive sentence in the Arches Court of Canterbury." The Bill was intituled "An Act to dissolve the marriage of Ralph Box with Elizabeth Eyre, and to enable him to marry again"; a title followed from that time until 1857. The Bill passed in 1701.

SECTION II.

DISSOLUTION OF MARRIAGE BY DIVORCE.

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The subject of divorce cannot be discussed in detail in this Treatise; but the law on this matter is, it is hoped, summarized here in such a way as to show the effect which decrees of divorce and judicial separation and protection orders have upon the relation of husband and wife.

In 1857, all jurisdiction in matrimonial matters was transferred from the Ecclesiastical Courts to the Court for Divorce and Matrimonial Causes, now the Probate and Divorce Division of the High Court of Justice. This Court was established by 20 & 21 Vict. c. 85 (z), and under that and subsequent amending statutes, intituled collectively the Matrimonial Causes Acts (a), it acquired not only all the powers of the Ecclesiastical Courts, but also power to pronounce decrees for dissolution of marriage, which down to that date could only have been obtained by Acts of Parliament.

Institution of
the Divorce
Court.

The Court has power, therefore, to deal with suits for dissolution of marriage (b), for judicial separations, which are thus substituted for divorces *a mensâ et thoro*, for nullity of marriage,

Suits which it
can entertain.

(z) See Macqueen on the Law of Divorce (2nd ed.), 1860.

(a) See (1858) 21 & 22 Vict. c. 108; (1859) 22 & 23 Vict. c. 61; (1860) 23 & 24 Vict. c. 144; (1866) 29 & 30 Vict. c. 32; (1868) 31 &

32 Vict. c. 77; (1873) 36 & 37 Vict. c. 71; (1878) 41 & 42 Vict. c. 19; (1884) 47 & 48 Vict. c. 68.

(b) 20 & 21 Vict. c. 85, ss. 27, 31; 23 & 24 Vict. c. 144, s. 7; 47 & 48 Vict. c. 68, s. 5.

Ch. VIII. s. 2. for restitution of conjugal rights, and for jactitation of marriage (*c*); it can give an injured husband damages (*d*), can deal with the custody of children (*e*), can make provision for the wife (*f*), can order a settlement to be made of property to which the wife is entitled, and can deal with settlements whether ante-nuptial or post-nuptial, and whether there are children of the marriage or not (*g*). A husband can present a petition for the dissolution of his marriage on the ground that his wife has been guilty of adultery; and a wife may seek the same relief on the ground that her husband has been guilty of incestuous adultery, of bigamy with adultery, of rape, of sodomy, of bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her in the Ecclesiastical Courts to a divorce *à mensâ et thoro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards (*h*).

Grounds for
petition.

A husband may claim damages from a person who has committed adultery with his wife, and the Court can direct in what manner such damages shall be applied (*i*).

Parties can
give evidence.

Parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, are competent to give evidence in such proceeding; but no witness shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (*k*). The protection of this proviso must be claimed by the witness, as otherwise the evidence is admissible (*l*). This provision does not enable a

(*c*) 20 & 21 Vict. c. 85, ss. 6, 7, 16.

(*d*) 20 & 21 Vict. c. 85, s. 33.

(*e*) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4; 47 & 48 Vict. c. 68, s. 6. See also, as to custody of children, 49 & 50 Vict. c. 27.

(*f*) 20 & 21 Vict. c. 85, s. 32; 29 & 30 Vict. c. 32, ss. 1, 2.

(*g*) 20 & 21 Vict. c. 85, s. 45; 22

& 23 Vict. c. 61, s. 5; 23 & 24 Vict. c. 144, s. 6; 41 & 42 Vict. c. 19, s. 3.

(*h*) 20 & 21 Vict. c. 85, s. 27.

(*i*) 20 & 21 Vict. s. 33.

(*k*) 32 & 33 Vict. c. 68, s. 3; *Brown v. Brown* (1874), L. R., 3 P. & M. 198.

(*l*) *Hebblethwaite v. Hebblethwaite* (1869), L. R., 2 P. & M. 29.

husband, against whom proceedings are taken to compel him to maintain a child born in wedlock, to give evidence of non-access so as to bastardize his child (*m*), upon the ground that if such evidence, without corroboration, were admissible, it would be within the power of either husband or wife, at any period subsequent to marriage, to bastardize the issue (*n*). Ch. VIII. s. 2.

Moreover, sexual intercourse between man and wife, living together, must always be presumed, and *nothing, except* direct evidence that the husband *did not have such intercourse* at the period of conception, can illegitimatize offspring (*o*).

It is, however, admissible for a husband to give evidence that he has never had intercourse with his wife before marriage; although the effect of such evidence be to illegitimatize a child born in wedlock (*p*).

The Divorce Court is a Court for England, which word includes Wales; but for the purposes of the jurisdiction of the Court, Ireland (*q*), Scotland, the Isle of Man, the Channel Islands, and the British Colonies are considered foreign countries (*r*).

Within the limits of its jurisdiction it is, however, for the Court to decide, alike in actions for judicial separation or for divorce, whether the case shall or shall not be tried *in camera* (*s*); and also, in matters not within the immediate purview of sect. 28 of the Matrimonial Causes Act, 1857, whether the issue shall, or shall not, be tried by a jury (*t*).

A limited jurisdiction, confined to judicial separation on the grounds of cruelty or habitual drunkenness (*u*), but otherwise carrying with it most of the incidents of the Probate and

(*m*) *The Guardians of Nottingham v. Tomkinson* (1879), 4 C. P. D. 343.

(*n*) *Rideout's Trusts, In re* (1870), L. R., 10 Eq. 41.

(*o*) *Gordon v. Gordon*, (1903) P. 141.

(*p*) *The Poulett Peerage*, (1903) A. C. 395.

(*q*) For Ireland, see Matrimonial Causes Act, 1870 (33 & 34 Vict. c. 110).

(*r*) *Yelverton v. Yelverton* (1859),

M.

1 S. & T. 586; *Bond v. Bond* (1860), 29 L. J., P. M. & A. 143; *Le Sueur v. Le Sueur* (1876), 1 P. D. 139; *Firebrace v. Firebrace* (1878), 4 P. D. 63.

(*s*) *Druce v. Druce*, (1903) P. 144.

(*t*) *Löwenfeld v. Löwenfeld*, (1903) P. 177.

(*u*) Licensing Act, 1902 (2 Ed. 7, c. 28), s. 5. For definition of "habitual drunkard," see *Robson v. Robson* (1904), 68 J. P. 416.

Ch. VIII. s. 2. Divorce Division of the High Court, is conferred upon magistrates by the Summary Jurisdiction (Married Women) Act, 1895 (x); the operation of this Act, like that of the Matrimonial Causes Acts, being confined to England and Wales (y).

As a rule the question of divorce is an incident of status to be disposed of by the law of the husband's domicile; it being both just and reasonable that the differences of married people should be adjusted in accordance with the law of the community to which they belong, and dealt with by the tribunals which alone can administer those laws (z). Consequently a wife's remedy for matrimonial wrongs must generally be sought in the place of her husband's domicile (a), the domicile of the husband being that of the wife. This joint domicile changes with each change of residence, when such change is accompanied by a *bonâ fide* intention on the part of the predominant partner (*i.e.*, the husband) to permanently abandon the domicile which he had previously acquired (b).

The only exception to this rule being that, for the purposes of testamentary dispositions of property, a British subject dying abroad, within twelve months of his abandoning his British domicile, retains until his demise his native domicile for all purposes of testate or intestate succession (c).

In cases of judicial separation between married people it is, however, probable, and most certainly just, that the wife should be capable of acquiring a domicile of her own. For where by judicial sentence the husband has lost the right to compel the wife to live with him, it is but reasonable that she should be entitled to set up a home of her own, and so establish a domicile differing from that of her husband (d).

(x) 58 & 59 Vict. c. 39.

(y) For disquisition on this Act, see *post*, p. 222.

(z) *Le Mesurier v. Le Mesurier*, (1895) A. C. 517, at p. 540.

(a) *Firebrace v. Firebrace* (1878), 4 P. D. 63; *Harvey v. Farnie*, 8 App. Cas. 43.

(b) Note Dicey's Conflict of Laws, 1896, p. 127.

(c) 24 & 25 Vict. c. 121.

(d) *Dolphin v. Robins* (1859), 7 H. L. C. 390; *Le Sueur v. Le Sueur* (1876), 1 P. D. 139, at p. 416; and see *Dalhousie v. McDouall* (1840), 7 Cl. & Fin. 817; *Yelverton v. Yelverton* (1859), 29 L. J., P. M. & A. 34; *Lolley's case* (1812), 1 Russ. & Ry. 237.

The vexed question of conflicting domiciles is altogether too complex to be more than summarised in a treatise dealing only with general principles. Suffice it, therefore, to say that according, apparently, to the better opinion—

Ch. VIII. s. 2.
Conflicting
domiciles.

- (1) No person can have at the same time more than one domicile;
- (2) No person can have a limited domicile in one place for a special purpose, and a general domicile in another place for all other purposes.

Consequently, the theory that a person may at one and the same time possess a matrimonial or forensic domicile (e) in one place and a general domicile in another, is alike repugnant to English law and to logical accuracy, and will not be supported by the Courts.

The confusion of ideas which has given rise to this theory has probably originated in the indisputable fact that a person may at the same time be domiciled in one country and resident in another (f). But "although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find the party had any other residence in existence or in contemplation" (g).

Mere residence in a country, without the acquisition of domicile, confers on the resident most of the rights and obligations attendant upon domicile. But in the absence of an avowed intention on the part of the resident to renounce his domicile of origin and acquire a fresh domicile, mere residence alone has no effect *per se*; especially as the onus of proving that one domicile has been chosen in substitution for another lies upon those who assert such substitution (h).

Yet although it is true that the acquisition of a domicile of choice precludes the idea of the existence of a concurrent domicile

(e) *Udny v. Udny* (1869), L. R., 1 Sco. App. 441; *contra*, *Capdevielle, In re* (1864), 2 H. & C. 985.

(f) *Gilles v. Gilles* (1874), Ir. R. 8 Eq. 597.

(g) *Bell v. Kennedy* (1868), L. R., 1 H. L. Sc. 307, at p. 321.

(h) *Winans v. Attorney-General*, (1904) A. C. 287; *Martin, In re, Loustalan v. Loustalan*, (1900) P. at p. 231.

Ch. VIII. s. 2. of origin, the latter is not extinguished or obliterated, but is only in abeyance. Consequently, upon the abandonment of the domicile of choice, the domicile of origin automatically revives (*i*).

Where, however, the abandonment of an existing domicile, and the consequent revival of an earlier one, or the renunciation of one domicile and the assumption of another, is for a particular and well-defined forensic purpose, such as a petition for, or a defence against, a dissolution of marriage, the *lex fori* of the earlier domicile is not thereby revived or the new one applied in favour of the person making such change of domicile.

Consequently, if a matrimonial offence be committed in the country of adoption, which gives the person aggrieved a remedy in the civil Courts of that country, the mere renunciation of the existing domicile and the adoption of another does not oust the jurisdiction of the Courts of the country in which the offence was committed, or allow either of the parties to set up the plea of domicile in bar of action (*k*).

A Scotch Court has no jurisdiction to decree the dissolution of a marriage between persons possessing an English domicile and married in England, if the parties have recourse to Scotland for the purpose of constituting a merely forensic domicile and are not *bonâ fide* domiciled there, even though the suit is instituted by the wife, who is by agreement living apart from her husband (*l*). But this rule respecting forensic domicile does not apply when the petition is for a judicial separation only, and not for a dissolution of marriage; the Court, as successor to the old Ecclesiastical Courts, having jurisdiction in the former, though not in the latter case (*m*). Again, a decree for a divorce granted by a foreign Court does not invalidate a marriage solemnized in England between English subjects domiciled in

(*i*) *Udny v. Udny* (1869), L. R., 1 Sco. App. 441. edit., vol. iv., pp. 45—53.

(*l*) *Bonaparte v. Bonaparte*, (1892) P. 402; *Shaw v. Gould* (1868), L. R., 3 H. L. 55; *Dolphin v. Robins* (1859), 7 H. L. C. 390.

(*m*) *Armytage v. Armytage*, (1898) P. 178.

(*k*) *Armytage v. Armytage*, (1898) P. 178; *Christian v. Christian* (1898), 78 L. T. 86. For an admirable disquisition on domicile, see Phillimore's *International Law*, 2nd

England (*n*). And no foreign Court can dissolve such a marriage between such persons on grounds for which it could not be dissolved in England (*o*); but an English Court will recognize as valid the decree of a foreign Court dissolving a marriage between a domiciled inhabitant of that country whose domicile has never been changed and an Englishwoman, where the marriage was solemnized in England, though the marriage is dissolved for a cause which would not be a ground for a divorce in England (*p*). It has been held that where there is residence in England, it does not necessarily follow that there must also be domicile to give the Court jurisdiction, for in a case in which an Englishwoman married a Frenchman at Gibraltar and afterwards resided in England, where the offences were committed, and the parties were resident at the time of the petition by the wife for a divorce, the majority of the Court of Appeal held that the statute empowered the Divorce Court to entertain the suit, as the matrimonial home of the parties was within the jurisdiction, although the husband had retained his foreign domicile (*q*). Brett, L. J., however, who dissented, held that the domicile of the husband was the test of the jurisdiction.

The proposition cited above can now, however, no longer be considered as good law, the House of Lords, in the more recent case of *Le Mesurier v. Le Mesurier* (*r*), having decided that sect. 27 of the Matrimonial Causes Act, 1857, cannot be construed as conferring upon the English Court *divorce* jurisdiction in *all cases* where a petition for a divorce *à mensâ et thoro* would previously have been entertained in the Bishop's Court. In one case a decree was granted against a foreigner, where the marriage was celebrated in England, although the offences were committed abroad; but for the reasons stated above, the accuracy of this decision is now

(*n*) *Bonaparte v. Bonaparte*, *supra*;
Green v. Green and Sedgwick, (1893)
P. 89; *Shaw v. Att.-Gen.* (1870),
L. R., 2 P. & M. 156.

(*o*) *Lolley's case* (1812), 1 Russ. &
Ry. 237; 2 Cl. & F. 567; *Briggs v.*
Briggs (1880), 5 P. D. 163.

(*p*) *Harvey v. Farnie* (1881), 8
App. Cas. 43; 6 P. D. 35.

(*q*) *Niboyet v. Niboyet* (1878), 4
P. D. 1. See the remarks on this
case in *Harvey v. Farnie*, *supra*.

(*r*) (1895) A. C. 517, at p. 531.

Ch. VIII. s. 2. open to grave question (s). And where the husband's domicile was in Jersey, and the marriage, the cohabitation, and the offences all took place there, it was held that the English Court had no jurisdiction to entertain a suit for divorce (t).

Validity of ceremony.

Where the question is one of the validity of the ceremony, then the law of the country where the marriage is solemnized must be considered (u), but questions of personal capacity to contract a marriage are decided by the domicile of the parties (x); except in case of marriages stamped as incestuous by the general consent of Christendom (y); and the Court of Appeal, in so holding, distinguished the case of *Simonin v. Mallac* (z), in which the full Court of Divorce refused to pronounce a decree of nullity in a case in which French subjects had come to England to be married, in order to avoid certain requirements of the French law, on the ground that the consent of the parents, which had not been obtained as required by the law of France, must be taken to be a part of the ceremony of marriage, and not a matter affecting the capacity of the parties to contract marriage (a).

Moreover, a presumption of valid marriage is raised by long-continued cohabitation, when coupled with a recognition of the legitimacy of the offspring (b).

Where party to suit is a lunatic.

Proceedings for dissolution of marriage can be instituted on behalf of or against a lunatic husband or wife; such proceedings may be instituted by the committee of the lunatic, and a guardian *ad litem* will be appointed if necessary (c).

(s) *Santo Teodoro v. Santo Teodoro* (1876 and 1880), 5 P. D. 79.

(t) *Le Sueur v. Le Sueur* (1876), 1 P. D. 139.

(u) *Lightbody v. West* (1903), 88 L. T. 484; *Bailet v. Bailet* (1901), 84 L. T. 272 (for note on this case, see *ante*, p. 11); *Hay v. Northcote*, (1900) 2 Ch. 262. As to evidence of such marriages, see *Whitton v. Whitton*, (1900) P. 178; *Cooper-King v. Cooper-King*, (1900) P. 65.

(x) *Bozzelli's Settlement, In re, Husey-Hunt v. Bozzelli*, (1902) 1 Ch. 751; *Sottomayor v. De Barros* (1877),

3 P. D. 1.

(y) *De Wilton, In re, De Wilton v. Montefiore*, (1900) 2 Ch. 481; *Bozzelli's Settlement, In re, Husey-Hunt v. Bozzelli*, (1902) 1 Ch. 751.

(z) (1860), 1 S. & T. 67; 29 L. J., P. M. & A. 97; and see *Hay v. Northcote*, (1900) 2 Ch. 262.

(a) See, however, the remarks of Sir J. Hannen in *Sottomayor v. De Barros* (1879), 5 P. D. 94.

(b) *Shephard, In re, George v. Thyer*, (1904) 1 Ch. 456.

(c) *Mordaunt v. Mordaunt* (1874), L. R., 2 H. L., Sc. & Div. 374;

Passing now to the grounds for which a divorce may be granted, it may be observed that incestuous adultery is defined by the statute to be adultery "committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity" (*d*). Ch. VIII. s. 2.
Incestuous
adultery
defined.

The prohibited degrees are specified in the table drawn up by Archbishop Parker, published by the authority of Queen Elizabeth, and often found prefixed to Bibles and the Book of Common Prayer. They are, in fact, the degrees specified in Leviticus, and are also found in Coke's 2 Inst. 683. The Statutes 32 Hen. 8, c. 38, revived by 1 Eliz. cc. 1 and 5, and 5 & 6 Will. 4, c. 54, are those now in force relating to this question (*e*). The laws of consanguinity or affinity apply in England to bastards, so that illegitimate children are for this purpose in the same position as legitimate children (*f*). Prohibited
degrees.

Bastards.

Bigamy is for the purposes of the Divorce Court, the "marriage of any person, being married, to any other person during the life of the former husband or wife; whether the second marriage shall have taken place within the dominions of her Majesty or elsewhere" (*g*). Bigamy.

Rape, sodomy (*h*) and bestiality are, for purposes of the Divorce Court, the same as the crimes known under those names, and dealt with by 24 & 25 Vict. c. 100, ss. 48 and 61, and constitute grounds for dissolution of marriage.

To establish a charge of legal cruelty, there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it (*i*). What consti-
tutes legal
cruelty.

Baker v. Baker (1880—1881), 5 P. D. 142; 6 P. D. 12; *Giles v. Giles*, (1900) P. 17; *Beecham, In re*, (1901) P. 65.

(*d*) 20 & 21 Vict. c. 85, s. 27.

(*e*) See notes to *Sherwood v. Ray* (1837), 1 Moo. P. C. C. 353; *Brook v. Brook* (1861), 9 H. L. Cas. 193.

(*f*) *R. v. St. Giles* (1847), 11 Q. B. 173.

(*g*) 20 & 21 Vict. c. 85, s. 27;

and see 24 & 25 Vict. c. 100, s. 57. For practice of the Court in cases of bigamy, see *Childers v. Childers* (1899), 68 L. J. P. 90.

(*h*) *N. v. N.* (1863), 9 L. T., N. S. 265.

(*i*) *Evans v. Evans* (1790), 1 Hag. C. C. 39; *Westmeath v. Westmeath* (1827), 2 Hag. Ecc. Sup. 55; *Milford v. Milford* (1866), L. R., 1 P. & M. 295.

Ch. VIII. s. 2. Neglect, coldness, indifference, isolation, abusive language (*k*), drunken habits, want of consideration or courtesy, petty annoyances, do not any of them by themselves constitute legal cruelty. But although not any one of these offences *per se* constitutes legal cruelty, the aggregate would probably be so considered by the Court (*l*). Wilful communication of venereal (*m*) or cutaneous (*n*) disease is cruelty; spitting in the face (*o*), and force, whether physical or moral, systematically exerted to compel submission of a wife in such a manner, to such a degree, and during such length of time as to break down her health and render a serious malady imminent, is legal cruelty (*p*). In the same category are included shock resulting from the conviction of the husband for an offence under the Criminal Law Amendment Act, 1885 (*q*), and false allegations of adultery by a husband resulting in injury to the health of the wife (*r*).

But, on the other hand, it has been held by a majority of the House of Lords (four dissenting) that wilful persistence by a wife in a false allegation of the commission of an unnatural crime by her husband—after she had ceased to believe in the charge—is not legal cruelty within the meaning of the definition (*s*).

In a wife's suit for dissolution, the adultery of the husband being proved, the Court dismissed the petition where the wife had been guilty of cruelty, of wilful separation, and of misconduct conducing to the adultery (*t*). Where, however, cruelty

(*k*) But see *Bishop v. Bishop*, (1901) P. 325. See also *Beauclerk v. Beauclerk*, (1891) P. 189; 64 L. T. 35, C. A.; *Walmsley v. Walmsley*, 69 L. T. 152; *Bethune v. Bethune*, (1891) P. 205; 63 L. T. 259; *Aubourg v. Aubourg* (1895), 72 L. T. 295.

(*l*) *Chesnutt v. Chesnutt* (1854), 1 E. & A. Rep. 196.

(*m*) *Boardman v. Boardman* (1866), L. R., 1 P. & M. 233; *Brown v. Brown* (1865), L. R., 1 P. & M. 46.

(*n*) *Chesnutt v. Chesnutt* (1854), 1

E. & A. 196.

(*o*) *Waddell v. Waddell* (1862), 31 L. J. Mat. 123.

(*p*) *Barrett v. Barrett* (1903), 20 T. L. R. 73; *Kelly v. Kelly* (1870), L. R., 2 P. & M. 59.

(*q*) *Thompson v. Thompson* (1901), 85 L. T. 172; *Bosworthick v. Bosworthick* (1902), 86 L. T. 121.

(*r*) *Jeapes v. Jeapes* (1903), 89 L. T. 77.

(*s*) *Russell v. Russell*, (1897) A. C. 395.

(*t*) *Boreham v. Boreham* (1865), L. R., 1 P. & M. 77.

was proved on the part of the husband, and adultery on the part of the wife, but no evidence was adduced that the cruelty led up to the adultery, or was entirely wanton and unprovoked in its character, the Court, in the exercise of its discretion, will not in all cases refuse to grant a decree dissolving the marriage (*u*). In a husband's suit for a judicial separation, on the ground of cruelty, the Court held that he was entitled to a decree, for although the physical effects of a wife's violence are less than those of a man's violence, yet the moral effects are in such a case greater (*x*).

Desertion without reasonable excuse when coupled with adultery, is a cause for which a wife may obtain a decree of divorce; desertion without cause for two years is a ground for a judicial separation, and desertion or wilful separation is a discretionary defence to a petition for a divorce. The word "desertion" always means the same, whether it is used alone or coupled with the words "without cause" or "without reasonable excuse," but it need not have lasted for two years, to enable a respondent to set it up in answer to a petition for a divorce (*y*).

No one can be said to desert who does not absent himself or herself from the society of the other without the consent of that other, and who does not actually and wilfully bring to an end an existing state of cohabitation (*z*), although there may be desertion without previous cohabitation (*a*); an involuntary separation caused by imprisonment does not therefore constitute desertion (*b*). But where a husband absconding to avoid criminal proceedings has either before or after, or both, committed adultery, the absence amounts to desertion (*c*); and a husband

(*u*) *Pryor v. Pryor and others*, 65; *Koch v. Koch*, (1899) P. 221; (1900) P. 157. See also *Foreyth v. Foreyth*, 63 L. T. 263.

(*x*) *Prichard v. Prichard* (1864), 3 S. & T. 523; *Forth v. Forth* (1867), 36 L. J., P. M. A. & E. 122.

(*y*) *Yeatman v. Yeatman* (1868), L. R., 1 P. & M. 489.

(*z*) *Fitzgerald v. Fitzgerald* (1869), L. R., 1 P. & M. 694; *Thompson v. Thompson* (1858), 27 L. J., P. & M.

(*a*) *De Laubenque v. De Laubenque*, (1899) P. 42.

(*b*) *Townsend v. Townsend* (1873), L. R., 3 P. & M. 129; *contra*, *Drew v. Drew* (1888), 13 P. D. 96.

(*c*) *Wynne v. Wynne*, (1898) P. 18; and see *Drew v. Drew*, *supra*.

Ch. VIII. s. 2. may still be guilty of desertion even though he supports his wife while absent from her (*d*). A separation by mutual agreement under a deed is not desertion (*e*); although, where the husband obtained an agreement from his wife that they should live separate, and, this being carried out, the wife committed adultery, the Court held that there being no reasonable ground for the agreement the husband had deserted his wife, and refused to grant him a divorce (*f*); and a similar rule has been applied where a wife, without sufficient cause, refused marital intercourse (*g*). But where there has been no bargain or consent, absence may constitute desertion (*h*), even though an allowance has been made (*i*); and separation, which is not at first desertion, may become so by acts which show an intention on the part of the absentee to abandon his or her partner (*k*). So also is failure to comply with a decree for restitution of conjugal rights (*l*). A *bonâ fide* belief on the part of a husband that his wife had wronged him has been held to justify a separation (*m*); and, on the other hand, a refusal by the husband to lead a chaste life, resulting in the wife being unable to continue cohabitation, constitutes desertion by the husband (*n*). But the conviction of a wife for a crime will not justify her husband in refusing to cohabit with her; and if by declining to do so he conduces to her adultery, he will be unable to obtain relief (*o*). The whole gist of the offence of desertion on the part of a husband seems to lie, when coupled with absence, in an avowed intention to break off matrimonial relations (*p*).

(*d*) *Yeatman v. Yeatman* (1868), L. R., 1 P. & M. 489.

(*e*) *Crabbe v. Crabbe* (1869), L. R., 1 P. & M. 601; *Parkinson v. Parkinson* (1869), L. R., 2 P. & M. 25; *Buckmaster v. Buckmaster* (1869), L. R., 1 P. & M. 713.

(*f*) *Huxtable v. Huxtable* (1899), 68 L. J. P. 83; *Dagg v. Dagg* (1882), 7 P. D. 17.

(*g*) *Synge v. Synge*, (1901) P. 317, C. A.

(*h*) *Martin v. Martin* (1898), 88 L. T. 568.

(*i*) *Nott v. Nott* (1866), L. R., 1 P. & M. 251.

(*k*) *Yeatman v. Yeatman*, *supra*; and *Wynne v. Wynne*, *supra*.

(*l*) *Paine v. Paine*, (1903) P. 263; *Bigwood v. Bigwood* (1888), 13 P. D. 89.

(*m*) *Ousey v. Ousey* (1874), L. R., 3 P. & M. 223.

(*n*) *Sickert v. Sickert*, (1899) P. 278; see also *Dickinson v. Dickinson* (1885), 62 L. T. 330.

(*o*) *Williamson v. Williamson* (1882), 51 L. J., P. D. & A. 54.

(*p*) *Charter v. Charter* (1901), 84

A husband who petitions for a divorce or a judicial separation may claim specific damages (*q*) on the ground of the adultery of the co-respondent with his wife, such damages being provable in bankruptcy (*r*), and the Court may direct how such damages are to be applied, and can settle them for the benefit of the children, or as a provision for the maintenance of the wife (*s*). Nor does the fact that there is no direct evidence that the co-respondent knew the respondent to be a married woman in all cases preclude the recovery of damages (*t*).

Ch. VIII. s. 2.

Damages for wife's adultery.

The statute directs that the Court shall dismiss a petition, if it is not satisfied that the alleged adultery has been committed, or if the petitioner has been accessory to or connived at or condoned the adultery, or that the petition is presented in collusion with either of the respondents (*u*). To establish connivance, there must be more than negligence or indifference, there must be acquiescence, active or passive (*x*). The intention of the husband is a material element, and his conduct must, in order to bar his right to relief, have conduced to the adultery (*y*); but he will be held to have connived if, when there are reasonable grounds for suspecting adulterous intercourse, he yet does not interfere (*z*). But connivance may not in all cases disentitle him to relief (*a*). If a wife, in order to obtain an allowance, consents that her husband shall live in adultery, her conduct amounts to connivance; but the mere acceptance of an allowance,

Petition dismissed if connivance, condonation, or collusion established.

L. T. 272; *Snape v. Snape* (1900), 64 J. P. 793.

(*q*) *Pegler v. Pegler* (1902), 85 L. T. 649. For rule as to assessment of damages, see *Evans v. Evans*, (1899) P. 195. And when assessment is larger than amount claimed, *Beckett v. Beckett and Jones*, (1901) P. 85.

(*r*) *O'Gorman, In re, Bale, Ex parte*, (1899) 2 Q. B. 62.

(*s*) 20 & 21 Vict. c. 85, s. 33.

(*t*) *Lord v. Lord and Lambert*, (1900) P. 297.

(*u*) 20 & 21 Vict. c. 85, s. 31.

(*x*) *Dixon v. Dixon* (1892), 67 L. T. 394, and *Duplany v. Duplany*

(1892), 67 L. T. 53 (wife's petition); *Parry v. Parry*, (1896) P. 37 (husband's petition); and see *Phillips v. Phillips* (1844), 1 Robert. 145; *Allen v. Allen* (1861), 30 L. J., P. & M. 2.

(*y*) *Starbuck v. Starbuck* (1890), 61 L. T. 876; *Stevens v. Stevens and Field* (1890), 61 L. T. 844; *Williamson v. Williamson and Bates* (1882), 46 L. T. 920; *Brown v. Brown and Robey* (1869), 21 L. T. 181.

(*z*) *Gipps v. Gipps* (1864), 33 L. J., P. & M. 161.

(*a*) *Lander v. Lander and others* (1890), 63 L. T. 257.

Ch. VIII. s. 2. under a separation deed, does not without other evidence establish connivance (*b*). If a husband or a wife employ a man to get evidence of adultery upon which to obtain a divorce, and the wife or husband is purposely induced by the intervention of that man to commit adultery, then the petitioner cannot obtain a divorce (*c*). And a conspiracy between parties, assisting either husband or wife, to effect such a purpose is a criminal offence (*d*).

Condonation. Condonation also bars the right to relief, and applies both to adultery and to cruelty. It is conditional forgiveness with full knowledge of all the circumstances (*e*), and with a due regard to the future, and is a question of fact (*f*); it may be expressed or implied (*g*); it must be followed by cohabitation (*h*); it is conditional, and the condition is, that the husband shall not for the future be guilty of any marital offence; so that it is wiped out by repeated misconduct (*i*).

A marital offence, which has been condoned, may be revived by a subsequent offence. The subsequent offence need not be of the same character as that which it revives; adultery condoned may, therefore, be revived by subsequent desertion for over two years (*k*); by subsequent incestuous adultery; by subsequent adultery, which is not incestuous, as well as by cruelty; cruelty may be revived by subsequent cruelty or by adultery; and desertion, which has been condoned, may be

(*b*) *Ross v. Ross* (1869), L. R., 1 P. & M. 734.

(*c*) *Bell v. Bell* (1889), 58 L. J., P. D. 54; *Pollard v. Pollard*, Times Newspaper, Dec. 11th, 1903, *et seq.*; *Picken v. Picken* (1865), 34 L. J., P. & M. 22; *Gower v. Gower* (1872), L. R., 2 P. & M. 428.

(*d*) *Rex v. Henry and others*, Times Newspaper, November 8th, 1904.

(*e*) *Bernstein v. Bernstein* (1893), 69 L. T. 513.

(*f*) *Dempster v. Dempster* (1862), 31 L. J., P. & M. 20.

(*g*) *Story v. Story* (1887), 12 P. D. 196; *Beeby v. Beeby* (1799), 1 Hag. Ecc. R. 793.

(*h*) *Keats v. Keats* (1859), 28 L. J., P. & M. 57; and see *Hall v. Hall and Kay* (1891), 64 L. T. 837. As to effect of resumption of cohabitation, see *Warwick v. Warwick* (1901), 85 L. T. 173.

(*i*) *Binney v. Binney* (1893), 69 L. T. 498; *Rogers v. Rogers* (1894), 70 L. T. 699; *Peacock v. Peacock* (1858), 27 L. J., P. & M. 71; 1 S. & T. 84; *Dent v. Dent* (1865), 34 L. J., P. & M. 48; 4 S. & T. 105; *Newsome v. Newsome* (1871), L. R., 2 P. & M. 306; *Blandford v. Blandford* (1883), 8 P. D. 19; *Collins v. Collins* (1884), 9 App. Cas. 205.

(*k*) *Houghton v. Houghton*, (1903) P. 150.

revived by subsequent adultery (*l*) ; and it would seem that less cruelty will be required to revive a condoned marital offence than would be required to establish an original charge (*m*). Ch. VIII. s. 2.

Nor is condonation subsequent to a decree *nisi* being granted, where a fresh matrimonial offence has been committed, invariably a bar to the decree being made absolute (*n*).

But where condonation subsequent to a decree *nisi* does constitute an effectual bar, that bar is effectual for all purposes except costs, and operates as a discharge of liability for damages assessed against a co-respondent (*o*).

Collusion is established where it is proved that the parties have agreed to act so as to obtain a divorce (*p*) ; or where, by agreement, they procure the withdrawal from the notice of the Court of facts which are relevant to the suit before the Court (*q*). The fact that a husband makes his wife an allowance in lieu of alimony, while a divorce suit is pending, is not by itself evidence of collusion (*r*) ; but where the husband gave the wife money, and urged her not to oppose the petition, and where the matrimonial offence was committed in pursuance of a promise made to the other party to give an opportunity of getting a divorce, the petition was rejected on the ground of collusion (*s*).

The Court has, in many of the cases above specified, no option but to dismiss the petition ; but in certain other cases the Court has a discretion, for the statute enacts that the Court shall not be bound to pronounce a decree if the petitioner has, during the

Collusion.
Grounds on which Court may dismiss petition.

(*l*) *Paine v. Paine*, (1903) P. 263 ; *Pulmer v. Palmer* (1860), 29 L. J., Mat. 124 ; *Newsome v. Newsome*, *supra* ; *Dent v. Dent*, *supra* ; *Bramwell v. Bramwell* (1831), 3 Hag. Ecc. Rep. 618 ; *Blandford v. Blandford* (1883), 8 P. D. 19.

(*m*) *D'Aguilar v. D'Aguilar* (1794), 1 Hag. Ecc. 773, at p. 781 ; *Durant v. Durant* (1825), 1 Hag. Ecc. 733, at p. 765.

(*n*) *Moore v. Moore* (1892), 67 L. T. 530 ; *Collins v. Collins* (1884), 9 P. D. 231.

(*o*) *Hyman v. Hyman and another*,

(1904) P. 403.

(*p*) *Churchward v. Churchward*, (1895) P. 7 ; *Taplen v. Taplen* (1891), 64 L. T. 870 ; *Lloyd v. Lloyd* (1859), 1 S. & T. 567.

(*q*) *Butler v. Butler* (1893), 69 L. T. 545, C. A. ; *Rogers v. Rogers* (1894), 70 L. T. 699. See also *Butler v. Butler* (1890), 15 P. D. 66 ; 62 L. T. 344 ; *Hunt v. Hunt* (1878), 47 L. J., P. D. & A. 22.

(*r*) *Barnes v. Barnes* (1867), L. R., 1 P. & M. 505.

(*s*) *Todd v. Todd* (1866), L. R., 1 P. & M. 121.

Ch. VIII. s. 2. marriage, committed adultery, if there has been unreasonable delay in presenting or prosecuting the petition, if the petitioner has been guilty of cruelty towards the other party, has deserted or wilfully separated without excuse from the respondent before the adultery complained of, or has been guilty of such wilful neglect or misconduct as has conduced to the adultery (*t*).

When relief granted notwithstanding adultery of petitioner.

In the following classes of cases the Court has been wont to grant a divorce notwithstanding the adultery of the petitioner, when such "adultery comes within a distinct category which excuses it in the eye of the law" (*u*): first, where the petitioner believed that the other party was dead (*x*); secondly, where the petitioner was compelled by her husband to lead a life of prostitution (*y*); and thirdly, where the adultery had been condoned, and had no connection with the offence charged in the suit (*z*). It has also done so in cases where the petitioner acted in ignorance, and was innocent of any intention to commit adultery; and where, although both petitioner and respondent had committed adultery, the adultery of the one had not conduced to the adultery of the other (*a*); but the exercise of the discretion given by the statute cannot depend upon the more or less pardonable circumstances which attend the commission of the offence (*b*).

Delay.

A delay of two years after knowledge of all the facts requires explanation (*c*); but want of means (*d*), residence abroad (*e*), or, in the case of a wife, forbearance at her mother's request to take

(*t*) 20 & 21 Vict. c. 85, s. 31.

(*u*) *Constantinidi v. Constantinidi and another*, (1903) P. 246, at p. 254; and as a typical example, see *Symons v. Symons*, (1897) P. 167.

(*x*) *Potter v. Potter* (1893), 67 L. T. 721; *Freegard v. Freegard and others* (1883), 8 P. D. 186.

(*y*) *Burdon v. Burdon*, (1901) P. 52.

(*z*) *Morgan v. Morgan* (1869), L. R., 1 P. & M. 644; *Coleman v. Coleman* (1866), L. R., 1 P. & M. 81.

(*a*) *Constantinidi v. Constantinidi and another*, *supra*; *Whitworth v.*

Whitworth, (1893) P. 85; *Snook v. Snook* (1892), 67 L. T. 389.

(*b*) *Heyes v. Heyes and Mason* (1887), 13 P. D. 11; *Noble v. Noble* (1869), L. R., 1 P. & M. 691; *Barnes v. Barnes* (1868), L. R., 1 P. & M. 572.

(*c*) *Johnson v. Johnson*, (1901) P. 193. See also *Beauclerk v. Beauclerk* (1891), 64 L. T. 35, C. A.; *Nicholson v. Nicholson* (1873), L. R., 3 P. & M. 53.

(*d*) *Mason v. Mason* (1883), 8 P. D. 21.

(*e*) *Stevens v. Stevens and another* (1890), 61 L. T. 844.

proceedings in a case of incestuous adultery, misconduct of the petitioner's agent and misapprehension by the petitioner of the law, have been held to afford sufficient explanation of what would otherwise be unreasonable delay (*f*). Ch. VIII. s. 2.

Cruelty, desertion, and wilful separation have already been Neglect. treated of, so that it only remains to consider what is wilful neglect or misconduct conducing to the adultery (*g*), which will justify the Court in refusing to grant the petition. The neglect or misconduct must be after the marriage, and must conduce to the first act of adultery (*h*); mere carelessness, mere omission to do something will not constitute misconduct; there must be knowledge of danger, and a purposed or reckless disregard of it (*i*); mere suspicion of misconduct is not enough to bar the right of the petitioner (*k*); but neglect, such as sending a wife to live in a place of temptation (*l*); coercion used to compel her to lead a life of prostitution (*m*); or adultery brought about by an agent of the husband (*n*); are instances of misconduct which will entitle the Court to dismiss a petition.

In any suit for dissolution of marriage, if the respondent being a husband opposes the relief sought on the ground of the adultery or cruelty of the petitioner; or being a wife, on the ground of the adultery, cruelty or desertion of the petitioner, the Court may give the respondent the relief to which he or she would be entitled if he or she had filed a petition seeking such relief (*o*). Decree of judicial separation may be granted when divorce refused.

(*f*) *Short v. Short* (1874), L. R., 3 P. & M. 193; *Wilson v. Wilson* (1872), L. R., 2 P. & M. 435; *Pellw v. Pellw* (1860), 29 L. J., P. & M. 44; *Tollemache v. Tollemache* (1859), 1 S. & T. 557; *Newman v. Newman* (1870), L. R., 2 P. & M. 57.

(*g*) *Parry v. Parry*, (1896) P. 37; 73 L. T. 759.

(*h*) *Shaw v. Shaw* (1904), 20 T. L. R. 795; *Coombs v. Coombs* (1903), 73 L. J. P. 23; *Wyke v. Wyke*, (1904) P. 149; *Lander v. Lander* (1890), 63 L. T. 257.

(*i*) *Robinson v. Robinson*, (1904) P. 149; *St. Paul v. St. Paul* (1869), L. R., 1 P. & M. 739; *Dering v. Dering* (1868), L. R., 1 P. & M. 531.

(*k*) But see *Jeffreys v. Jeffreys* (1864), 10 L. T. 309; *Davies v. Davies* (1863), 32 L. J., P. & M. 111.

(*l*) *Coleman v. Coleman* (1866), L. R., 1 P. & M. 81.

(*m*) *Burdon v. Burdon*, (1901) P. 52; *Gower v. Gower* (1872), L. R., 2 P. & M. 428.

(*n*) *Bell v. Bell* (1889), 58 L. J., P. D. 54; *Baylis v. Baylis* (1867), L. R., 1 P. & M. 395.

(*o*) 29 & 30 Vict. c. 32, s. 2.

SECTION III.

THE DECREE AND ITS EFFECTS.

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Decree is nisi
in the first
instance.

A decree of dissolution of marriage is only a decree *nisi* in the first instance, not to be made absolute for six months (*p*). The primary reason for this statutory delay in making absolute a decree *nisi* is, apparently, in order to permit the intervention of the King's Proctor in cases where further investigation is desirable (*q*).

It should also be noted that by virtue of the exception contained in sect. 9 of the Supreme Court of Judicature Act, 1881, an appeal after trial by jury in the Divorce Division lies, in cases of dissolution or nullity of marriage, directly from the Divorce Court to the House of Lords against an order of the Court of Appeal granting a new trial (*r*).

The decree when made absolute is for all purposes a complete severance of the matrimonial tie, and enables either party to marry again, so that the rights of a divorced husband which depend on the contract of marriage cease at the date of the

(*p*) 23 & 24 Vict. c. 144, s. 7; 29 & 30 Vict. c. 32, s. 3. The Court has discretionary power, which is exercised but rarely, in special circumstances to fix a shorter time than six months, but not less than three months: *Rogers v. Rogers* (1894), 6 Rep. 589; *Rippingall v. Rippingall* (1883), 48 L. T. 126; *Watton v. Watton* (1866), L. R., 1

P. & M. 227; *Fitzgerald v. Fitzgerald* (1874), L. R., 3 P. & M. 136.

(*q*) *Rogers v. Rogers*, (1894) P. 161.

(*r*) *Butchart v. Butchart*, (1901) A. C. 266. In view of the Supreme Court of Judicature Act, 1881, *Robertson v. Robertson* (1881), 44 L. T. 253 (H. L.), can no longer be considered as good law.

decree becoming absolute (s); and a husband who has been divorced from his wife is no longer responsible for any debts which she may contract even for necessities, or for any torts which she may commit, or even which she has committed during coverture (t); for the woman becomes by the decree in all respects a *feme sole*, she can sue and be sued, and is alone responsible on her contracts, and for her torts. The decree bars the right of the wife to dower (u). A decree *nisi* being merely an inchoate stage in a litigation does not put an end to the coverture, and the legal status of the parties is not altered until the decree has been made absolute (x). Nor is an application to the Court of Appeal on the part of the wife after the decree *nisi* on any matter relating to or arising out of the divorce (as, for example, the custody of the children, or the re-adjustment of settlements) such an institution of new litigation as will justify the making of an order under sect. 2 of the Married Women's Property Act, 1893, for the payment of the costs out of the wife's separate estate restrained from anticipation (y); but, in the case of marriages contracted before January 1st, 1883, a husband will not be allowed, after a decree *nisi* has been pronounced, to reduce into possession choses in action of the wife, the title to which has accrued before that date (z).

Ch. VIII. s. 3.

When absolute dissolves the marriage and makes the woman a *feme sole*.

Where a woman obtains a decree for a divorce she becomes thereby a *feme sole*; but this alteration of status does not deprive her of the right to use her husband's name (a); although the marital right of her husband in respect of future property belonging to her ceases from the date of the decree. Where, at

Decree of divorce makes wife a *feme sole*.

(s) *Wilkinson v. Gibson* (1867), L. R., 4 Eq. 162. A divorced husband was held to take a life interest given on the death of the daughter of the testator to any husband who should survive her: *Re Bullmore* (1883), 52 L. J., Ch. 456.

(t) *Capel v. Powell* (1865), 34 L. J., C. P. 168; 17 C. B., N. S. 743.

(u) *Frampton v. Stephens* (1882), 21 Ch. D. 164.

(x) *Norman v. Villars* (1877), 2 Ex. D. 359; *Hulse v. Hulse* (1871), L. R., 2 P. & M. 259.

(y) *Gordon v. Gordon*, (1904) P. 163, C. A. As to payment out of Court of money deposited for wife's costs before decree is made absolute, see *Butler v. Butler* (1889), 14 P. D. 161.

(z) *Prole v. Soady* (1868), L. R., 3 Ch. 220.

(a) *Cowley v. Cowley*, (1901) A. C. 450.

Ch. VIII. s. 3. the date of a decree of dissolution of marriage, made at the suit of the wife, she was entitled to a reversionary interest which fell into possession after the date of the divorce, she, and her executors on her death, were held to be entitled to the fund (*b*). The dissolution of the marriage does not of itself forfeit the rights of the guilty party in property included in a marriage settlement (*c*); but the *corpus* of a post-nuptial settlement must not be alienated (*d*), and the Court has power, after a final decree, to deal with settlements (*e*).

Court has power to deal with settlements.

The Act of 1857 provided, by sect. 45, that in any case in which a sentence of divorce or judicial separation should be pronounced for the adultery of the wife, should it appear that she was entitled to any property either in possession or reversion, the Court might order a settlement of such property, or any part thereof, for the benefit of the innocent party and the children of the marriage (*f*). It was held that this section did not give the Court power to deal with a settlement made on the marriage of the parties of the suit (*g*), or to deal with property, the payment of which to the wife was dependent on the discretion of trustees, such a possibility not being a reversion within the statute (*h*). Much larger powers were given to the Court by 22 & 23 Vict. c. 61, s. 5 (*i*), which provides that the Court may, after a final decree of nullity of marriage or dissolution of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the

(*b*) *Wilkinson v. Gibson* (1867), L. R., 4 Eq. 162.

(*c*) *Fitzgerald v. Chapman* (1875), 1 Ch. D. 563; *Burton v. Sturgeon* (1876), 2 Ch. D. 318.

(*d*) *Noakes v. Noakes* (1877), 4 P. D. 60.

(*e*) 22 & 23 Vict. c. 61, s. 5; 41 Vict. c. 19, s. 3.

(*f*) *Sykes v. Sykes* (1870), L. R., 2 P. & M. 163; *Midwinter v. Midwinter*, (1892) P. 28; 65 L. T. 438,

C. A.; also (1893) P. 93; 68 L. T. 262.

(*g*) *Norris v. Norris* (1858), 27 L. J., P. & M. 72.

(*h*) *Milne v. Milne* (1871), L. R., 2 P. & M. 295.

(*i*) See also Rules of the Divorce Court, 95 *et seq.* As to what constitutes a settlement for the purposes of sect. 5 of the Matrimonial Causes Act, 1859, see *Hubbard v. Hubbard*, (1901) P. 157, C. A.

property settled either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit. Ch. VIII. s. 3.

Under this section the Court can deal with all deeds whereby property is settled on a woman in her character of a wife, and by which money is to be paid to her while she continues a wife (*k*), as well as with a power of appointment given to a wife by settlement (*l*), but at one time there was no power to make an order under this section, unless there was issue of the marriage living at the time when the order was applied for (*m*). The Court can now, however, exercise the power given by the above section, notwithstanding that there are no children of the marriage (*n*); this last provision is not retrospective (*o*); where, however, the decree *nisi* was pronounced before, but was not made absolute until after, the amending Act came into force, the Court varied a settlement, even though there was no issue of the marriage (*p*). The respondent to a petition for a divorce will be restrained from disposing of property included in a post-nuptial settlement, before the petitioner who has obtained a decree *nisi* can obtain an order varying the settlement (*q*). A settlement cannot be varied by depriving an infant child of an interest secured to it by the settlement (*r*), or by altering the destination of dividends due before the date of the order (*s*), but it seems that provisions as to the appointment of trustees will be

Whether
there is issue
or not.

(*k*) *Jump v. Jump* (1883), 8 P. D. 159; *Worsley v. Worsley* (1869), L. R., 1 P. & M. 648; *Clifford v. Clifford* (1884), 9 P. D. 77. Capital as well as income can be dealt with: *Ponsonby v. Ponsonby* (1884), 9 P. D. 122.

(*l*) *Evered v. Evered* (1874), 43 L. J., P. & M. 86; 31 L. T., N. S. 101.

(*m*) *Thomas v. Thomas* (1860), 2 Sw. & T. 89; *Bird v. Bird* (1866), L. R., 1 P. & M. 231; *Corrance v. Corrance* (1868), L. R., 1 P. & M. 495.

(*n*) 41 Vict. c. 19, s. 3.

(*o*) *Yglesias v. Yglesias* (1878), 4 P. D. 71.

(*p*) *Ansdell v. Ansdell* (1880), 5 P. D. 138.

(*q*) *Noakes v. Noakes* (1878), 4 P. D. 60; *Watts v. Watts* (1876), 24 W. R. 623.

(*r*) *Douglas v. Douglas* (1898), 78 L. T. 88; *Newall v. Newall* (1898), 78 L. T. 203; and see *Pryor v. Pryor* (1887), 12 P. D. 165; 57 L. T. 533; *Crisp v. Crisp* (1872), L. R., 2 P. & M. 426; but see *Whitton v. Whitton*, (1901) P. 348.

(*s*) *Paul v. Paul* (1870), L. R., 2 P. & M. 93.

Ch. VIII. s. 3. altered (*t*). Moreover, in cases of ante-nuptial settlements, where upon grant of a decree *nisi* there is no issue of the marriage the Court, subsequently to the decree being made absolute (*u*), may grant to the injured party a re-conveyance of the property originally settled by him or her, freed from the trusts of the settlement (*x*). And the same rule has been followed, by the Court of Appeal, where a child of the dissolved marriage, after attaining a vested interest, died unmarried and intestate (*y*). Nor, apparently, is re-marriage by a petitioner an absolute bar to an unconditional re-conveyance of property settled upon her without power of anticipation (*z*).

Object regarded in dealing with settlement.

The object of the Court in varying the provisions of a settlement is to prevent the innocent party from being damaged in a pecuniary sense by the dissolution of the marriage (*a*), although the Court has jurisdiction to entertain the petition of a guilty party (*b*). And in cases where the Divorce Court has ordered an undue allowance to a petitioner, the Court of Appeal will reverse such order (*c*). An innocent party, therefore, may be relieved from a covenant to appoint in favour of the guilty party (*d*), and the conduct of the parties as well as their pecuniary position will be taken into consideration (*e*). Thus where, under a marriage settlement, a guilty wife had power to re-settle property on the death of her husband; the Court refused to permit her upon the dissolution of her first marriage, and subsequent re-marriage with the co-respondent, to re-settle the property during her first husband's lifetime (*f*). Where

(*t*) *Maudslay v. Maudslay* (1877), 2 P. D. 256; *Oppenheim v. Oppenheim* (1884), 53 L. J., P. D. & A. 48; but see *Hope v. Hope* (1874), L. R., 3 P. & M. 226; and *Davies v. Davies* (1868), 37 L. J., P. & M. 17.

(*u*) *Constantinidi v. Constantinidi*, (1904) P. 306, C. A.

(*x*) *Wynne v. Wynne* (1898), 78 L. T. 796; *Meredyth v. Meredyth*, (1895) P. 92.

(*y*) *Blood v. Blood*, (1902) P. 190.

(*z*) *Merton v. Merton* (1900), 83 L. T. 223.

(*a*) *Stedall v. Stedall* (1902), 86 L. T. 124; *Kaye v. Kaye* (1902), 86

L. T. 638, C. A.; *Maudslay v. Maudslay* (1877), 2 P. D. 256; *March v. March* (1867), L. R., 1 P. & M. 440.

(*b*) *Wootton-Isaacson v. Wootton-Isaacson*, (1902) P. 146.

(*c*) *Savary v. Savary* (1899), 79 L. T. 607, C. A.

(*d*) *Benyon v. Benyon* (1876), 1 P. D. 447.

(*e*) *Constantinidi v. Constantinidi*, (1905) 21 T. L. R. 651, C. A.; *Chetwynd v. Chetwynd* (1865), L. R., 1 P. & M. 39.

(*f*) *Branton-Day v. Branton-Day* (1898), 88 L. T. 358; and see *Pollard v. Pollard*, (1894) P. 172.

a marriage is dissolved on the wife's petition, and the husband's interest in property brought into settlement by the wife is extinguished, the Court will not impose the condition that she shall only enjoy the property *dum sola et casta vixerit* (g), although such a condition may be imposed when the husband is ordered to make her an allowance out of his private means (h), and the discretion given to the Court is wide enough to enable the Court to exclude a guilty party from the benefit of property brought into settlement on the marriage (i). Thus, where a specific allowance was settled upon a petitioning wife upon her marriage, out of which the joint establishment was to be kept up, upon the petitioner obtaining a divorce the Court refused to vary the settlement by deducting therefrom any proportion of such allowance (k).

The trustee of a marriage settlement cannot apply to alter the settlement; but he may oppose an application (l). If a petitioner dies pending proceedings the guardian of the children should make the application (m). If the petitioner dies before the decree *nisi* has been made absolute, the Court will not make the decree absolute so as to enable the settlements to be varied (n). And a similar rule with regard to settlements has been applied in case of the decease of a petitioner after the decree has been made absolute, but before the petition for variation has been adjudicated upon (o).

Ch. VIII. s. 3.

Trustee cannot apply to vary settlement.

(g) *Gladstone v. Gladstone* (1876), 1 P. D. 442.

(h) *Edwards v. Edwards*, (1894) P. 33; *Nevill v. Nevill* (1893), 69 L. T. 463; *Saunders v. Saunders* (1893), 69 L. T. 498; *Bashall v. Bashall* (1897), 76 L. T. 165; *Fisher v. Fisher* (1861), 2 S. & T. 410; *Chetwynd v. Chetwynd* (1865), L. R., 1 P. & M. 39.

(i) *Wigney v. Wigney* (1882), 7

P. D. 177, C. A.; *Clifford v. Clifford* (1884), 9 P. D. 76.

(k) *Wootton-Isaacson v. Wootton-Isaacson*, (1902) P. 146.

(l) *Corrance v. Corrance* (1868), L. R., 1 P. & M. 495.

(m) *Smithe v. Smithe* (1868), L. R., 1 P. & M. 587.

(n) *Grant v. Grant* (1862), 31 L. J., P. & M. 174.

(o) *Thomson v. Thomson*, (1896) P. 263.

DECREE OF JUDICIAL SEPARATION AND ITS EFFECTS.

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When a decree of judicial separation may be granted.

In all cases in which a decree for a divorce *à mensâ et thoro* could formerly have been pronounced the Court can now pronounce a decree for a judicial separation, which has the same consequences as the divorce *à mensâ et thoro* had (*p*); a judicial separation may also be obtained on the ground of adultery, cruelty or desertion, without cause for two years or upwards (*g*).

Cases of aggravated assault.

If a husband is convicted of an aggravated assault upon his wife within the meaning of 24 & 25 Vict. c. 100, s. 43, the Court or magistrate before whom he is convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall no longer be bound to cohabit with her husband. Such an order has the effect of a decree of judicial separation (*r*), and may, unless the wife has committed adultery, provide for weekly alimony and the custody of the children.

Modern legislation.

Further protection is afforded to women by the Summary Jurisdiction (Married Women) Act, 1895 (*s*); as to which, see *post*, p. 222.

The Licensing Act, 1902 (*t*), also provides, by sect. 5, that where a husband, or a wife, is a habitual drunkard as defined by sect. 3 of the Habitual Drunkards Act, 1879 (*u*), a Court of

(*p*) 20 & 21 Vict. c. 85, s. 7.
 (*g*) *Ibid.* sect. 16.
 (*r*) 41 & 42 Vict. c. 19, s. 4. This section is now repealed and replaced by the provisions of 58 & 59 Vict. c. 38.

(*s*) 58 & 59 Vict. c. 38.
 (*t*) 2 Edw. 7, c. 28.
 (*u*) 42 & 43 Vict. c. 19; and see *Robson v. Robson*, (1904) 68 J. P. 416.

summary jurisdiction, upon application by the injured party, Ch. VIII. s. 4. may make any one or more of the following orders:—

- “(a) A provision that the applicant be no longer bound to cohabit with his wife (which provision, while in force, shall have the effect in all respects of a decree of judicial separation on the ground of cruelty);
- “(b) A provision for the legal custody of any children of the marriage;
- “(c) A provision for alimony to the wife (maximum two pounds weekly).”

The Court will not grant a judicial separation to a husband, on the ground of his wife's adultery, if he has been guilty of cruelty and desertion (*x*), or to a wife, on the ground of the husband's adultery and cruelty, when she herself has been guilty of a matrimonial offence (*y*); or if there be an existing deed of separation between the parties, and no allegation of fresh misconduct of an aggravated character (*z*). When refused.

A decree of judicial separation, or a separation deed, not specifically pleaded, is no bar to a suit for a divorce, for the matrimonial tie continues, and adultery after the decree may be joined to cruelty before the separation (*a*). Not a bar to a petition for divorce.

Where a decree for a judicial separation has been pronounced the wife is by statute to be considered (quite apart from the provisions of the Married Women's Property Acts) as a *feme sole* from the date of the decree, and while the separation continues with respect to property of every description which she may acquire, or which may come to or devolve upon her, and also with respect to any choses in action not reduced into possession at the date of the decree. She can dispose of all such property as though she were a *feme sole*; if she dies intestate, it goes as it would have gone if her husband were dead, and if she returns to cohabitation with her husband, all such property as Constitutes wife a *feme sole*.
Effect on property.

(*x*) *Lempriere v. Lempriere* (1868), L. R., 1 P. & M. 569. P. D. 98; *Russell v. Russell*, (1897) A. C. 395.

(*y*) *Grossi v. Grossi* (1873), L. R., 3 P. & M. 118. (*a*) *Green v. Green* (1873), L. R., 3 P. & M. 121; *Bland v. Bland* (1866), 35 L. J., P. & M. 104;

(*z*) *Gandy v. Gandy* (1882), 7 P. D. 168; *secus*, in cases of aggravation, *Morrall v. Morrall* (1881), 6 *Yeatman v. Yeatman* (1870), 21 L. T. 733; *Dowling v. Dowling*, (1898) P. 228.

Ch. VIII. s. 4. she may be entitled to when such cohabitation shall take place will, subject to any agreement in writing made between her and her husband while separate, be considered as held to her separate use (b). These provisions extend to property to which she has become entitled as executrix, administratrix or trustee since the date of the decree, and to property to which she is entitled in remainder or reversion (c). The wife is thus, during the separation, considered in law as a *feme sole* for the purposes of contracts, wrongs and injuries, and of suing and being sued (d); her husband is not liable on her engagements, contracts or torts, nor is he responsible for any costs she may incur subsequently to the decree being granted (e). But it does not relieve the husband from liability in respect of contracts made on his account by his wife under her authority, which contracts were in existence and undetermined at the time of the judicial separation; and if he does not pay the alimony ordered he will be liable for necessities supplied to her (f). She can give a good discharge for a legacy paid to her after the decree (g), and in the case of after-acquired property it puts an end to a restraint on anticipation (h).

Enables her
to sue and be
sued.

No discharge, variation, or reversal of a decree for judicial separation is to prejudice or affect any rights or remedies which any person would have had in case the same had not been reversed, varied, or discharged in respect of any debts, contracts or acts of the wife incurred, entered into or done between the

(b) 20 & 21 Vict. c. 85, s. 25 (Matrimonial Causes Act, 1857); *Johnson v. Lander* (1869), L. R., 7 Eq. 228; *Re Ford* (1864), 33 L. J., Ch. 180; *Re Insole* (1865), L. R., 1 Eq. 470; *In the Goods of Worman* (1859), 1 Sw. & T. 513; *In the Goods of Faraday or Farraday* (1861), 2 Sw. & T. 369; *Nicholson v. Drury Buildings Co.* (1877), 7 Ch. D. 48.

(c) *Emery's Trusts* (1884), 32 W. R. 357; 21 & 22 Vict. c. 108, ss. 7, 8.

(d) *Ramsden v. Brearley* (1874),

L. R., 10 Q. B. 147.

(e) *Wingfield & Blew, In re*, (1904) 2 Ch. 665, C. A.

(f) 20 & 21 Vict. c. 85, s. 26.

(g) *Re Coward & Adams' Purchase* (1875), L. R., 20 Eq. 179.

(h) *Waite v. Morland* (1888), 38 Ch. D. 135, C. A.; *Hill v. Cooper*, (1893) 2 Q. B. 85, C. A.; *Munt v. Glynes* (1872), 41 L. J., Ch. 639; *Davenport v. Marshall*, (1902) 1 Ch. 82. The earlier case of *Cooke v. Fuller*, 26 Beav. 99, can no longer be regarded as good law.

times of the making of the decree, and of the discharge, variation Ch. VIII. s. 4. or reversal thereof (i).

Whether a decree of judicial separation enables a wife to acquire a separate domicile has not been expressly decided (k), but it seems that the presumption of the wife's domicile being that of her husband fails after such a decree (l). The far-reaching results deducible from a decision that a judicial separation confers a new domicile upon a petitioning wife will probably prevent any complete crystallization of the law on this very important point; it appearing, as a necessary sequence, that if the decree for judicial separation does, in fact, confer upon her the power henceforward to select her own domicile, such a decree may, in the future, be but one stage in a series of proceedings terminating (in the event of the commission of an aggravated matrimonial offence subsequent to the decree) in a complete dissolution of the marriage; it being scarcely conceivable that if a judicially separated wife acquires a domicile of her own, such acquisition should not carry with it the right to institute proceedings for all purposes in the Courts of that country in which she elects to take up her residence.

The Court has not, in the case of a decree for a judicial separation, that power to deal with settlements, whether ante-nuptial or post-nuptial, which is conferred on it by statute in the case of a decree for dissolution of marriage (m); although by virtue of sect. 45 of the Matrimonial Causes Act, 1857, it may, in the case of a guilty wife, order such settlements of property "as it shall think reasonable for the benefit of the innocent party and of the children of the marriage, or either or any of them." And where the application for judicial separation is made by the wife, the Court can make any order for permanent alimony which shall be deemed just (n).

Effect on her domicile.

Court has no power to deal with settlements, but can order permanent alimony.

(i) 21 & 22 Vict. c. 108, s. 8.

505; *Le Sueur v. Le Sueur* (1876),

(k) *Dolphin v. Robins* (1859), 7

1 P. D. 139.

H. L. C. 390.

(m) *Gandy v. Gandy* (1882), 7

(l) See *ante*, p. 178; *Williams v.*

P. D. 168.

Dormer (1852), 2 Rob. Ec. Rep.

(n) 20 & 21 Vict. c. 85, s. 17.

SECTION V.

THE CUSTODY OF CHILDREN AFTER A DECREE FOR A
DIVORCE OR FOR A JUDICIAL SEPARATION.

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2. <i>Guardianship of Infants Act, 1886.</i>	202	4. <i>When and on what principles the Court will act</i>	203

Custody of children.

In any suit for a judicial separation or for nullity of marriage, and on any petition for dissolving a marriage, the Court can by interim or other order made before, in or after a final decree, make such provision as it thinks fit, with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the suit or decree, and it can place the children under the protection of the Chancery Division (*o*). If a husband is convicted of an aggravated assault upon his wife, the Court or magistrate before whom he is convicted may give to the wife the legal custody of any children under the age of sixteen years, provided that the wife has not committed adultery, or, if she has, provided the adultery has been condoned (*p*).

In cases of aggravated assault.

Guardianship of Infants Act, 1886.

It is, moreover, enacted by sect. 7 of the Guardianship of Infants Act, 1886 (*q*), that—

“In any case where a decree, either *nisi* or absolute, for divorce shall be pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage, and in such case the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children” (*r*).

(*o*) 21 & 22 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4; Rules of the Divorce Court, 104, 195, 212.

(*p*) 58 & 59 Vict. c. 39, ss. 5—6.

(*q*) 49 & 50 Vict. c. 27.

(*r*) And see *Skinner v. Skinner* (1888), 13 P. D. 90; *Woolnoth v. Woolnoth* (1902), 86 L. T. 598.

The power thus conferred by the Matrimonial Causes Acts on the Divorce Court may be exercised as soon as both parties are before the Court (*s*), and is extended by sect. 6 of the Matrimonial Causes Act, 1884, to interim orders upon applications for restitution of conjugal rights (*t*). The discretion given to the Court is wider than that which had been previously exercised by Courts of Law and Equity (*u*), and in dealing with the question, the interests of the children are considered paramount (*x*). It can regulate their custody, maintenance, and education until the age of twenty-one years (*y*); it will consider the conduct of the parties especially as regards access by the guilty parent (*z*), but will not, as a rule, infringe *pendente lite* on the father's right to the custody of his children (*a*), although it may exercise a wide discretion in the matter (*b*). If the wife succeeds in her suit she is generally entitled to the custody of the children (*c*), and where the father is leading a notoriously dissolute life he will probably be held disqualified from having the custody of them (*d*), but no hard-and-fast rule can be laid down (*e*). After a decree of judicial separation in favour of the party in whose custody the children have been placed, the Court may allow other persons to question in their behalf the propriety of the custody (*f*); but in view of the decision in the more recent case of *Davis v. Davis* (*g*), this proposition must now be regarded

Ch. VIII. s. 5.
Time for
exercise of
power.

Principles on
which the
Court Acts.

(*s*) *Stacey v. Stacey* (1860), 29 L. J., P. & M. 63.

(*t*) *Paine v. Paine* (1902), 50 W. R. 382.

(*u*) *Marsh v. Marsh* (1859), 1 S. & T. 312.

(*x*) *Boynton v. Boynton* (1861), 2 S. & T. 275; *Ryder v. Ryder* (1861), 30 L. J., P. & M. 44; *Bent v. Bent* (1861), 2 S. & T. 392; *D'Alton v. D'Alton* (1878), L. R., 4 P. D. 87.

(*y*) *Thomassett v. Thomassett*, (1894) P. 295, C. A.; overruling *Blandford v. Blandford*, (1892) P. 148. As to maintenance after age of twenty-one, see *Savary v. Savary* (1899), 79 L. T. 607.

(*z*) *Hundley v. Handley*, (1891) P. 124.

(*a*) *Curtlidge v. Curtlidge* (1862), 2 S. & T. 567; *Barnes v. Barnes* (1867), L. R., 1 P. & M. 463.

(*b*) *Favard v. Favard* (1897), 75 L. T. 664.

(*c*) *Hart's Div. Bill*, (1898) A. C. 305, Ir.; *Paine v. Paine* (1902), 50 W. R. 382; *Marsh v. Marsh* (1859), 1 S. & T. 312; *Suggate v. Suggate* (1859), 1 S. & T. 492.

(*d*) *Hyde v. Hyde* (1860), 29 L. J., P. & M. 150; *March v. March* (1867), L. R., 1 P. & M. 437.

(*e*) *Witt v. Witt* (1891), 64 L. T. 121.

(*f*) *Godrich v. Godrich* (1873), L. R., 3 P. & M. 134.

(*g*) (1889), P. D. 162.

Ch. VIII. s. 5. as open to question. The Court will, however, if it be for the interest of the children to do so, give the custody of them to a third person with access on the part of both parents (*h*). Upon non-compliance with an order of the Court as to the custody of children, a writ of attachment will issue against the recalcitrant party for contempt on an *ex parte* application (*i*).

May be given to third parties.

In some instances, matrimonial differences respecting the custody of a child have resulted in one or other of the parties denying its legitimacy. In such cases, the fact that a child is born in wedlock is *prima facie* evidence that it is the legitimate issue of the marriage, although such evidence is not in all cases conclusive (*k*).

SECTION VI.

PROTECTION ORDER AND ITS CONSEQUENCES.

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3. What constitutes desertion for this purpose	205		
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Protection order under 20 & 21 Vict. c. 85, s. 21.

By sect. 21 of the Act of 1857 (*l*), a wife deserted by her husband may any time after desertion apply to a police magistrate, to justices in petty sessions, or to the Court for an order to protect any money or property she may acquire by her own lawful

(*h*) *D'Alton v. D'Alton* (1878), 4 A. C. 395; *Gordon v. Gordon*, (1903) P. D. 87; *Chetwynd v. Chetwynd* (1865), L. R., 1 P. & M. 39. P. 92, 141; *Evans v. Evans*, (1904) P. 274; *Yool v. Ewing*, (1904) 1 Ir. R. 434.
(*i*) *Favard v. Favard* (1897), 75 L. T. 664; *Gordon v. Gordon*, (1903) P. 141.
(*l*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 6; and 27 & 28 Vict. c. 44.
(*k*) *Poulett Peerage Claim*, (1903)

industry, and any property of which she may become possessed after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate, or justices, or Court, if satisfied of the fact of the desertion, that it was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make an order protecting the earnings and property of the wife acquired since the commencement of the desertion, and they will belong to the wife as though she were a *feme sole*. The order must be registered in the County Court; but this provision is directory only, so that a delay in registration will not render it invalid (*m*), and a wife who has obtained such an order is, during the continuance of it, to be during the desertion in the like position in all respects with regard to property, contracts, suing and being sued, as she would be if she had obtained a decree of judicial separation (*n*).

Ch. VIII. s. 6.

Order should be registered.

A discharge or variation of the order is not to affect any rights of third parties which have been created while it was in force, and persons who act under it are to be indemnified (*o*). The successors or substitutes of justices or magistrates who made an order can vary or discharge it (*p*), and an application to discharge an order is not limited to the lifetime of the woman who obtained it (*q*).

Rights of third parties.

Power to vary or discharge order.

Desertion under these sections means that the husband has left his wife without provision (*r*); mere absence in his ordinary occupation is not desertion (*s*); the desertion must continue at the time when the order is made; a *bonâ fide* offer of the husband to return will destroy the right to an order (*t*); and it must be shown that the wife is maintaining herself by her own industry or property (*u*). The application is made on

What constitutes desertion. And see *ante*, p. 185.

(*m*) *In the Goods of Farraday or Faraday* (1862), 31 L. J., P. & M. 68.

(*n*) 20 & 21 Vict. c. 85, s. 21.

(*o*) 21 & 22 Vict. c. 108, ss. 8, 10.

(*p*) 27 & 28 Vict. c. 44; see also Rules of the Divorce Court, 124, 125, 197.

(*q*) *Mudge v. Adams* (1881), 6 P. D. 54; and see *Mahoney v. McCarthy*, (1892) P. 21.

(*r*) *Cargill v. Cargill* (1858), 27 L. J., P. & M. 69.

(*s*) *Exp. Aldridge* (1858), 1 S. & T. 88.

(*t*) *Cargill v. Cargill* (1858), *supra*; *Ewart v. Chubb* (1875), L. R., 20 Eq. 454; 45 L. J., Ch. 108; *Rudge v. Weedon* (1859), 28 L. J., Ch. 889.

(*u*) *Yeatman v. Yeatman* (1868), L. R., 1 P. & M. 489.

Ch. VIII. s. 6. affidavit stating the facts (*x*); the order should state the time when the desertion commenced, and should be framed in general terms, not mentioning specific property (*y*). It only includes the lawful earnings of lawful trade (*z*), it is retrospective (*a*), but does not enable the wife to maintain an action commenced before the date of the order (*b*). The order extends to property to which the wife has or shall become entitled as executrix, administratrix or trustee, and property to which she is entitled in remainder or reversion (*c*). It also includes a reversionary interest falling into possession after the desertion (*d*). Money refunded after desertion by a liquidator in respect of shares the property of the wife, and registered prior to the desertion in the joint names of herself and her husband (*e*), and a legacy charged on real estate, not reduced into possession before the date of the order, have been held to be property acquired after desertion (*f*). But it does not avoid a restraint on anticipation where the life interest devolved on the wife before the desertion (*g*). A *feme covert* who has obtained such an order will be ordered the payment of, and can give a receipt for, a legacy given to her in general terms (*h*); and, if an executrix, she is entitled to a transfer of stock standing in the name of her testator without the concurrence of her husband (*i*).

What the order includes.

Effect of order.

The order entitles the woman to sue as though she were a *feme sole*; and thus she can sue for damages for libel (*k*); it discharges a restraint on anticipation (*l*); it may equally with

(*x*) *Exp. Sewell* (1859), 28 L. J., P. & M. 8.

(*y*) *Exp. Mullineux* (1858), 27 L. J., P. & M. 19.

(*z*) *Mason v. Mitchell* (1865), 34 L. J., Ex. 68.

(*a*) *Re Ann Elliot* (1871), L. R., 2 P. & M. 274.

(*b*) *Midland Railway v. Pye* (1861), 10 C. B., N. S. 179.

(*c*) 21 & 22 Vict. c. 108, ss. 7, 8.

(*d*) *Re Whittingham* (1864), 12 W. R. 775; *Insole, In re*, L. R., 1 Eq. 470.

(*e*) *Nicholson v. Drury Buildings*

Co. (1877), 7 Ch. D. 48.

(*f*) *Re Coward and Adams' Purchase* (1875), L. R., 20 Eq. 179.

(*g*) *Hill v. Cooper*, (1893) 2 Q. B. 85, C. A.

(*h*) *Re Kingsley's Trusts* (1859), 28 L. J., Ch. 80; *Re Rainsdon's Trusts* (1859), 28 L. J., Ch. 334.

(*i*) *Bathe v. The Bank of England* (1858), 4 K. & J. 564.

(*k*) *Ramsden v. Brearley* (1874), L. R., 10 Q. B. 147.

(*l*) *Cooke v. Fuller* (1858), 26 Beav. 99; *Munt v. Glynes* (1872), 41 L. J., Ch. 639.

a decree for a divorce deprive the husband of his right of Ch. VIII. s. 6. administration (m); it does not deprive the wife of right to alimony *pendente lite* (n).

A woman who has obtained a protection order is, with regard to property acquired since the desertion, in the same position as a wife who has obtained a decree of judicial separation, so that she can make a will of such property, and, if she die intestate, it will go as though her husband were dead (o).

SECTION VII.

MATRIMONIAL SUITS OTHER THAN SUITS FOR DIVORCE
OR JUDICIAL SEPARATION.

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The jurisdiction of the Ecclesiastical Courts in suits for nullity of marriage, for restitution of conjugal rights, and for jactitation of marriage, was transferred by 20 & 21 Vict. c. 85, to the Court for Divorce and Matrimonial Causes.

A suit for nullity of marriage may be instituted in the Divorce Division of the High Court for the purpose of obtaining a declaration that a marriage is null and void; and matrimonial

(m) *In the Goods of Stephenson* (1866), L. R., 1 P. & M. 287; *In the Goods of Hay* (1865), L. R., 1 P. & M. 51.

(n) *Hakewill v. Hakewill* (1861), 30 L. J., P. & M. 251.

(o) *In the Goods of Farraday* (1861), 2 S. & T. 369.

Ch. VIII. s. 7. residence within the jurisdiction, without domicile, confers on the Court adjudicatory power (*p*).

Void marriages.

A marriage is void *ab initio* if the parties affecting to enter into the contract are under disabilities which prevent them from entering into the contract at all.

Marriages of lunatics.

The marriage of a lunatic, unless contracted in a lucid interval, is null and void (*q*); so are marriages of persons within the prohibited degrees (*r*), of persons already married (*s*); and, therefore, of either of the parties to a divorce suit, if the marriage is celebrated before the decree has been made absolute (*t*).

Formalities of and mode of celebration.

Marriages are also void if solemnized by a person falsely pretending to be in holy orders (*u*), or if they have been celebrated without the formalities as to the place or mode of celebration required by the common or statute law; but to render a marriage by banns void, for want of compliance with the provisions of 4 Geo. 4, c. 76, it is necessary that both parties should be aware of the informality (*x*); and in the case of a marriage before a registrar, inaccuracies in the notice given pursuant to 6 & 7 Will. 4, c. 85, have been held not to vitiate the marriage (*y*). Duress, intimidation, force, fraud, or mental prostration resulting in inability to resist coercion (if excessive) are all grounds for decrees of nullity (*z*).

(*p*) *Roberts (alias Brennan) v. Brennan*, (1902) P. 143.

(*q*) Blackstone, cited in *Browning v. Reane* (1812), 2 Phill. 69; *Hancock v. Peaty* (1867), L. R., 1 P. & M. 335; and as to lunatics so found by commission, see 51 Geo. 3, c. 37; applying to both England and Ireland.

(*r*) *Andrews v. Ross* (1888), 14 P. D. 15; and see *ante*, p. 11.

(*s*) Upon a petition for a declaration of nullity from this cause, the Court cannot order maintenance as a condition precedent: *Bateman v. Bateman* (1898), 78 L. T. 472. As to alimony *pendente lite*, see *Childers v. Childers* (1899), 68 L. J. P. 90.

(*t*) Re-marriage after a decree *nisi*, in honest belief that it dissolved the earlier marriage, will

not prevent the grant of a decree absolute: *Moore v. Moore*, (1892) P. 382; *Whitworth v. Whitworth*, (1893) P. 85.

(*u*) *Reg. v. Ellis* (1888), 16 Cox, C. C. 469.

(*x*) *R. v. Wroxtton* (1833), 4 B. & Ad. 640; *Templeton v. Tyree* (1872), L. R., 2 P. & M. 420; *Fendall v. Goldsmid* (1877), 2 P. D. 263; *Greaves v. Greaves* (1872), L. R., 2 P. & M. 423; *Gompertz v. Kensit* (1872), L. R., 13 Eq. 369.

(*y*) *Holmes v. Simmons* (1868), L. R., 1 P. & M. 523.

(*z*) *Scott (alias Sebright) v. Sebright* (1886), 12 P. D. 21; *Ford (alias Stier) v. Stier*, (1896) P. 1; *Cooper (alias Crane) v. Crane*, (1891) P. 369.

Persons, who by the law of the country of their domicile are under a personal disability to contract marriage, cannot go to another country and there contract a valid marriage (*a*). Ch. VIII. s. 7.

To entitle a third party to institute a suit for nullity of marriage, there should be pecuniary interest: mere relationship is not enough; but as parents are bound to maintain their children and grand-children, they have a sufficient interest to enable them to maintain such a suit in respect of their children and grand-children (*b*). Who may institute suit.

A marriage will be declared void if either of the parties is impotent, the ground of the interference of the Court being the practical impossibility of consummation (*c*), and the fact of non-consummation raises a presumption of impotency (*d*). Generally, cohabitation for three years will be required (*e*); but if absolute impotency is proved *aliunde*, the Court will make a decree without waiting for the lapse of that time (*f*). Agreement not to sue is, however, an effective bar (*g*). Wilful wrongful refusal of marital intercourse will not by itself in all cases warrant the Court in granting the decree (*h*), but if only curable with great danger to life, a decree of nullity will be made (*i*). Some corroboration of the charge, by medical evidence or inspection, is required, and unreasonable delay, although not an absolute bar to that suit, is a formidable obstacle to its success (*k*), for the relief will not be granted unless promptly sought (*l*). Impossibility of consummation.
When delay a bar.

(*a*) *Sottomayor v. De Barros* (1877), 3 P. D. 1. As to effect of foreign domicile on petitions for nullity, see *Turner (alias Thompson) v. Thompson* (1888), 13 P. D. 37; *Moore (alias Bull) v. Bull*, (1891) P. 279.

(*b*) *Bevan v. McMahon* (1859), 2 S. & T. 58; *Sherwood v. Ray* (1837), 1 Moo. P. C. C. 353, at p. 397; 43 Eliz. c. 2; 45 & 46 Vict. c. 75, s. 21.

(*c*) *G. v. G.* (1871), L. R., 2 P. & M. 287; *D. v. A.* (1845), 1 Rob. 279.

(*d*) *B. (alias H.) v. B.*, (1901) P. 39; *F. v. P.*, *alias F.* (1896), 75 L. T. 192.

M.

(*e*) *Scott v. Jones* (1842), 2 N. C. 36.

(*f*) *F. v. D.* (1865), 4 S. & T. 86; *L. v. L.* (1882), 7 P. D. 16; *Welde v. Welde* (1731), 2 Lee, 580.

(*g*) *Aldridge v. Aldridge, alias Morton* (1888), 13 P. D. 210.

(*h*) *S. v. A.* (1878), 3 P. D. 72; but see *E. v. E.*, *alias T.* (1902), 87 L. T. 149.

(*i*) *W. v. H.* (1861), 30 L. J., P. & M. 73.

(*k*) *R. v. R.* (1876), 1 P. D. 405; but see *L. (alias B.) v. B.*, (1895) P. 274.

(*l*) *Cuno v. Cuno* (1873), L. R., 2 H. L. Sc. App. 300.

Ch. VIII. s. 7. Impotency renders the marriage void *ab initio*, but the impotent party cannot institute the suit (*m*); evidence of identity is necessary (*n*); nor can a marriage be impeached on this ground after the death of one of the parties (*o*). The decree is like a decree for a divorce, only a decree *nisi* in the first instance, and if collusion is proved it will not be made absolute (*p*). As in divorce, a decree of nullity confers on the Court jurisdiction to vary settlements (*q*).

Restitution of conjugal rights. Application for restitution of conjugal rights may be made by petition to the Court, and the Court may, if satisfied of the truth of the allegations contained in the petition, and that there is no legal ground why the decree should not be made, grant a decree of restitution (*r*). A written demand for cohabitation, which must be in a conciliatory form, must first be made, and the respondent may, if willing to return to cohabitation, obtain a stay of proceedings (*s*). Both citation and petition may, however, be served out of the jurisdiction (*t*). The only ground for a petition of this nature is that one party has withdrawn from cohabitation without lawful excuse; the Court cannot entertain the petition if there is cohabitation (*u*), but if there has been withdrawal, then the petitioner is entitled to a decree, unless the respondent can prove some matrimonial offence which would be a ground for a decree of judicial separation (*x*). Mere improprieties on the part of a wife form no defence (*y*); but a wife who has committed adultery cannot obtain a decree, even though the husband

Withdrawal from cohabitation the ground for petition.

(*m*) *Norton v. Seton* (1819), 3 Phill. 147.

(*n*) *H. (alias G.) v. G.* (1900), 69 L. J. P. 120.

(*o*) *A. v. B.* (1868), L. R., 1 P. & M. 559.

(*p*) 36 & 37 Vict. c. 31.

(*q*) *Dormer (alias Ward) v. Ward*, (1901) P. 20, C. A.; *Attwood (alias Pomeroy) v. Attwood*, (1903) P. 7; *F. v. E., alias T.* (1902), 87 L. T. 149.

(*r*) 20 & 21 Vict. c. 85, s. 17.

(*s*) Rules 175, 176; *Field v. Field* (1888), 14 P. D., C. A.; *Smith v.*

Smith (1890), 61 L. T. 697; *Mason v. Mason* (1889), 61 L. T. 304.

(*t*) *Bateman v. Bateman*, (1901) P. 136; *Hardie v. Hardie* (1901), 84 L. T. 64; *contra*, see *Chichester v. Chichester* (1885), 10 P. D. 186.

(*u*) *Pearson v. Pearson* (1864), 33 L. J., P. & M. 156; *Orme v. Orme* (1824), 2 Add. 382.

(*x*) *Scott v. Scott* (1865), 34 L. J., P. & M. 23; *Burroughs v. Burroughs* (1861), 2 S. & T. 303; *Dysart v. Dysart* (1844), 1 Rob. 106.

(*y*) *Rippingall v. Rippingall* (1876), 24 W. R. 967.

has also committed adultery (s). Impotency is a sufficient answer to such a petition, as the validity of the marriage is thereby denied (a). It was for some time doubtful whether a separation deed could be pleaded in answer to such a petition, although it afforded a good answer to a charge of unjustifiable absence, but it is now settled that it can; and it is an *à fortiori* case, that if it contain an agreement that no suit for the restitution of conjugal rights shall be instituted, the parties to the agreement will be held bound, and a petition presented by either will be dismissed (b). But where the separation deed covenants to pay an annuity, and default is made, a decree will be granted (c). A petition for restitution of conjugal rights is not the appropriate remedy for desertion (d).

Ch. VIII. s. 7.

Plea of separation deed valid.

Upon granting the decree the Court will impose a time limit within which compliance must be made, and in cases of contumacy, as opposed to necessity, time will run even when service of the decree is made out of the jurisdiction (e).

In event of non-compliance with an order of the Divorce Court, decreeing restitution of conjugal rights, it is provided by sect. 5 of the Matrimonial Causes Act, 1884, that the respondent "shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted," although two years may not have elapsed. And where the statutory desertion created by this Act has also been coupled with adultery, the Court may pronounce a decree *nisi* for the dissolution of the marriage (f).

Jactitation of marriage is when "one of the parties boasts or gives out that he or she is married to the other, whereby a

Jactitation of marriage.

(z) *Hope v. Hope* (1858), 27 L. J., P. & M. 43; 1 S. & T. 94.

(a) *Ricketts v. Ricketts* (1866), 35 L. J., P. & M. 92.

(b) *Clark v. Clark* (1885), 10 P. D. 188; *Kunski v. Kunski* (1899), 68 L. J. P. 18; *Marshall v. Marshall* (1879), 5 P. D. 19; *Anquez v. Anquez* (1866), L. R., 1 P. & M. 176; *Wilson v. Wilson* (1848), 1 H. L. Ca. 538, at p. 572; *Besant v. Wood* (1879), 12 Ch. D. 605.

(c) *Tress v. Tress* (1887), 12 P. D. 128.

(d) *Drysdale v. Drysdale* (1867), L. R., 1 P. & M. 365; 36 L. J., P. & M. 39.

(e) *Dicks v. Dicks*, (1899) P. 275; *Bateman v. Bateman*, (1901) P. 136.

(f) 47 & 48 Vict. c. 68; and see *Bigwood v. Bigwood* (1888), 13 P. D. 89; *Harding v. Harding* (1886), 11 P. D. 111.

Ch. VIII. s. 7. common reputation of their matrimony may ensue. On this ground the party injured may libel the other in a Spiritual Court, and unless the defendant undertakes and makes out proof of the actual marriage he or she is enjoined perpetual silence on that head " (g) .

To such an action, which is now of very rare occurrence, the respondent may answer by denying the charge, may prove a marriage, or may allege that the petitioner has allowed the respondent to assume the married character, and, in such a case, the Court has refused to pronounce a sentence of malicious jactitation (h) . A decree of perpetual silence was made against the jactitator in the case of an informal Jewish marriage (i) .

The suit can be brought only by party to the alleged marriage.

When sentence in this suit evidence.

Such a suit can only be instituted by one of the parties to the alleged marriage (k) , unless the complainant be a minor, in which case the guardian has been allowed to maintain the suit (l) . A sentence of jactitation has been received upon a title in ejectment as evidence against a marriage, and in personal actions founded on a supposed marriage ; but it was not admitted as conclusive evidence in a criminal case so as to stop a prosecution founded on a charge of bigamy (m) .

(g) 3 Blackst. Comm. 93.

(h) *Thompson v. Bourke*, (1892) P. 244 ; (1893) P. 70, C. A. ; *Hawke v. Corri* (1820), 2 Hagg. Cons. 280 ; *Bodkin v. Case* (1835), Milward's Ir. Ecc. Rep. 355.

(i) *Goldemid v. Bromer* (1798), 1 Hagg. Cons. 324.

(k) *Exp. Campbell* (1862), 31 L. J., P. & M. 60.

(l) *Buller v. Dolben* (1756), 2 Lee, 312.

(m) *The Duchess of Kingston's case* (1776), 2 Sm. L. C., 11th ed., p. 731.

SECTION VIII.

ALIMONY AND MAINTENANCE.

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Alimony is an allowance made to a wife out of her husband's Alimony. means for her support, either during a matrimonial suit or after its termination.

A wife, who sued for a divorce, was always treated as a privileged suitor, as regards maintenance and costs, for the reason that all her property was presumed to vest in her husband, so that provision was made for her in the Ecclesiastical Court, by allowing her alimony during the pendency of the suits which could be brought in those Courts, and by providing in proper cases permanent alimony or maintenance for her after the suit had been determined.

The Matrimonial Causes Acts empower the Divorce Court, when granting a decree for dissolution of marriage, to secure to the wife such a gross or annual sum of money as should be reasonable, regard being had to her fortune, to the ability of the husband, and to the conduct of the parties, and give it In the Divorce Court.

Ch. VIII. s. 8. the same power to make interim orders for the payment of money during the pendency of a petition, as it would have in a suit for a judicial separation (*n*). The Act of 1866 provides (*o*) that the Court may, in such cases, order the husband to make monthly or weekly payments to his wife, and the amount may from time to time be varied (*p*).

Weekly or
monthly
payments may
be ordered.

Alimony
pendente lite.

A wife, who is a petitioner in a cause, may present a petition for alimony *pendente lite* as soon as the citation in the principal suit has been served, or as soon as an order dispensing with service has been made, and a wife who is a respondent may do so after having entered an appearance (*q*); and, when once the marriage is established as a fact, she is entitled to alimony *pendente lite*, unless her husband has no means (*r*), or she has sufficient means of her own (*s*). Nothing is allowed to interfere with the *prima facie* right, so that the fact that a wife is imprisoned for felony does not affect it (*t*); and a deed intended to convey all the property of the husband against whom a suit for a divorce is pending will be set aside (*u*). But where there is no default by the husband in the payment of instalments of alimony *pendente lite*, the Court will not, in all cases, restrain him from parting with some of his property (*x*).

If, however, a decree *nisi* is obtained, an injunction will be granted binding a sufficient proportion of the *corpus* to cover the order of the Court in respect of maintenance (*y*). For the

(*n*) See also Rules of the Divorce Court, 81 to 103, 189 to 192, 204, 214, 215.

(*o*) 29 & 30 Vict. c. 32, s. 1. The order cannot be made in the alternative: *Medley v. Medley* (1881), 7 P. D. 122.

(*p*) *Maclurcan v. Maclurcan* (1897), 77 L. T. 474, C. A.; *Jardine v. Jardine* (1882), 6 P. D. 213.

(*q*) Rules of the Divorce Court, 81, 82 *et seq.*, and 191, 192.

(*r*) A voluntary allowance is means for this purpose: *Bonsor v. Bonsor*, (1897) P. 77. But a discrepancy between the statements of

a petitioner and respondent as to means will not in all cases subject the latter to cross-examination: *Sykes v. Sykes*, (1897) P. 306, C. A.

(*s*) *Miles v. Chilton* (1849), 1 Robertson, 684, at p. 700. Proof of bigamy by a woman avoids her right to alimony: *Childers v. Childers* (1899), 68 L. J. P. 90.

(*t*) *Kelly v. Kelly* (1863), 32 L. J., P. & M. 181.

(*u*) *Blenkinsopp v. Blenkinsopp* (1852), 1 De G., M. & G. 495.

(*x*) *Carter v. Carter*, (1896) P. 35.

(*y*) *Newton v. Newton*, (1896) P. 36.

purpose of alimony *pendente lite* the wife is considered an innocent party, notwithstanding any allegations charging her with adultery (s). A plea to the jurisdiction of the Court does not affect the power of the Court to allow such alimony (a).

Ch. VIII. s. 8.

Wife for this purpose considered innocent.

Both alimony, whether *pendente lite* or permanent, and permanent maintenance, are alike purely personal allowances, and whether they can be alienated or released during the subsistency of the order granting them depends upon the statute and the section of the statute under which they were decreed. Thus, if the payment was originally ordered under the provisions of sect. 1 of the Matrimonial Causes Act, 1857, it is apparently inalienable, but if under the amending Act, 1866, it can be either released or assigned (b).

Alimony will not be given if the husband is not shown to have present income; an expectation of future income will not suffice (c); but it will be allotted on his average annual earnings, although he may at the moment be out of employment (d). It will not be allotted, if the wife has sufficient independent property of her own, if she has been living apart from her husband, has been and is still able to support herself by her own earnings (e); nor if she is living with another man and is supported by him (f); nor will it usually be allotted by way of an increased allowance to a wife who is separated from her husband and who receives an annuity under the separation deed (g).

Husband must have present income.

Wife must not have independent property.

The amount given by the Ecclesiastical Courts was generally one-fifth of the husband's net income, and this at the present

Amount regulated by circumstances of each case.

(s) *Crampton v. Crampton* (1863), 32 L. J., P. & M. 142.

(a) *Ronalds v. Ronalds* (1875), L. R., 3 P. & M. 259.

(b) *Watkins v. Watkins*, (1896) P. 222, C. A.; *Maclurcan v. Maclurcan* (1897), 77 L. T. 474, C. A.

(c) *Fletcher v. Fletcher* (1862), 2 S. & T. 434; 31 L. J., P. & M. 82; *Brown v. Brown* (1863), 3 S. & T. 217; 32 L. J., P. & M. 144; *Gaynor v. Gaynor* (1862), 31 L. J., P. & M. 116.

(d) *Thompson v. Thompson* (1867), L. R., 1 P. & M. 553.

(e) *Goodheim v. Goodheim* (1861), 2 S. & T. 250; 30 L. J., P. & M. 162; *Coombs v. Coombs* (1866), L. R., 1 P. & M. 218; *Burrows v. Burrows* (1867), L. R., 1 P. & M. 553; *George v. George* (1863), 32 L. J., P. & M. 17.

(f) *Holt v. Holt* (1868), L. R., 1 P. & M. 610.

(g) *Powell v. Powell* (1874), L. R., 3 P. & M. 186.

Ch. VIII. s. 8. day has been increased to one-third (*h*); but the circumstances of each case, such as the nature of the property, the expenses of supporting the children of the marriage, and the extravagance of the wife, are taken into account (*i*). The fact that the husband has to support his children by a prior marriage makes no difference in the amount allotted (*k*), nor will it be increased if the wife supports the children of the marriage, as in such a case she should apply for maintenance for them under sect. 35 of the Act of 1857.

When payable.
Ceases when wife's adultery established.

The alimony, if allotted, is payable from the service of the citation (*l*); and where the wife is the respondent in a suit in which adultery is charged, it ceases when the adultery is established (*m*), although, in exceptional cases, the Court has jurisdiction to order a compassionate allowance to a guilty wife (*n*). And even when it is proved that a petitioning wife has committed adultery subsequent to the decree *nisi*, she is entitled to alimony and costs up to the date of such proof (*o*); moreover, if there are arrears, the Court will not make a decree *nisi* obtained by the husband absolute until the arrears are paid (*p*), and alimony will continue to be payable to her during an appeal, unless it is merely frivolous and vexatious (*q*); nor, if the wife use due diligence in claiming alimony, will the husband be allowed to withdraw his petition, until he has paid the alimony allotted to her up to the time of withdrawal (*r*); but although no order will be made after a decree *nisi*, if the wife has been unnecessarily tardy in filing her petition for alimony (*s*), yet, after a decree *nisi*, and before a decree absolute,

Arrears must be paid.

Can be given

- | | |
|--|---|
| (<i>h</i>) <i>Cobb v. Cobb</i> , (1900) P. 294. | <i>Ashcroft v. Ashcroft</i> , (1902) P. 270, C. A. |
| (<i>i</i>) <i>Sykes v. Sykes</i> , (1897) P. 306, C. A.; <i>Hawkes v. Hawkes</i> (1828), 1 Hag. 526; <i>Harris v. Harris</i> (1828), 1 Hag. 351. | (<i>o</i>) <i>Whitmore v. Whitmore</i> (1866), 13 L. T. 723. |
| (<i>k</i>) <i>Hill v. Hill</i> (1864), 33 L. J., P. & M. 104. | (<i>p</i>) <i>Latham v. Latham</i> (1861), 30 L. J., P. & M. 163; 2 S. & T. 299. See <i>Ellis v. Ellis</i> (1863), 8 P. D. 188. |
| (<i>l</i>) <i>Nicholson v. Nicholson</i> (1862), 31 L. J., P. & M. 165. | (<i>q</i>) <i>Jones v. Jones</i> (1872), L. R., 2 P. & M. 333. |
| (<i>m</i>) <i>Madan v. Madan</i> (1869), 19 L. T., N. S. 612; <i>Wells v. Wells</i> (1864), 3 S. & T. 542; 33 L. J., P. & M. 151. | (<i>r</i>) <i>Twistleton v. Twistleton</i> (1872), L. R., 2 P. & M. 339. |
| (<i>n</i>) <i>Squire v. Squire</i> , (1905) P. 5; | (<i>s</i>) <i>Noblett v. Noblett</i> (1869), L. R., 1 P. & M. 651. |

the suit is still pending, so that alimony *pendente lite* can during that period be granted (*t*). Ch. VIII. s. 8.
after decree
nisi.

The terms "maintenance" and "permanent alimony" are generally used, the former when the decree is for the dissolution of the marriage, the latter when the decree is for the relief sought in the other suits, the jurisdiction over which has been transferred from the Ecclesiastical Courts to the Divorce Division. Maintenance
and perma-
nent alimony.

The petition for maintenance should be filed after the decree *nisi*, and before the decree absolute (*u*); but the Court has power to make the order after the decree absolute has been pronounced (*x*). Petition for,
after decree
nisi.

The amount to be allotted as maintenance in the case of a dissolution of marriage is in the discretion of the Court (*y*), regard being had to the fortune of the wife, the ability of the husband, and the conduct of the parties (*z*); it can allot the income arising from a gross sum secured to the wife for life (*a*), or order an annual, monthly or weekly payment to be made, and the principle on which the Court acts is, that a wife is not to be left destitute, but that she is not to gain greatly by the decree of dissolution, and that she shall enjoy it *dum casta et sola vixerit* (*b*), though this latter provision may be varied by the omission of the word *casta* (*c*). Principle on
which it is
allotted.

(*t*) *Ellis v. Ellis* (1883), 8 P. D. 188; *S. v. B.* (1884), 53 L. J., P. D. & A. 63.

(*u*) Rules of the Divorce Court, 95, 96 and 214; *Charles v. Charles* (1866), L. R., 1 P. & M. 260.

(*x*) *Sidney v. Sidney* (1867), 36 L. J., P. & M. 73; *Bradley v. Bradley* (1878), 3 P. D. 47.

(*y*) 20 & 21 Vict. c. 85, s. 32.

(*z*) *Shorthouse v. Shorthouse* (1898), 79 L. T. 366. In *Farrington v. Farrington* (1886), 11 P. D. 84, a guilty wife was ordered to supplement her husband's income.

(*a*) *Twentyman v. Twentyman*,

(1903) P. 86; this decision, though obviously correct, is irreconcilable with the earlier cases of *Stanley v. Stanley*, (1898) P. 227; *Kirk v. Kirk*, (1902) P. 145.

(*b*) *Kettlewell v. Kettlewell*, (1898) P. 138; *Edwards v. Edwards*, (1894) P. 33; *Wood v. Wood*, (1891) P. 272; *Lister v. Lister* (1889), 15 P. D. 4; *Fisher v. Fisher* (1862), 31 L. J., P. & M. 1; 2 S. & T. 410.

(*c*) *Smith v. Smith*, (1898) P. 29; and see *Harrison v. Harrison* (1887), 12 P. D. 130; *Lander v. Lander*, (1891) P. 161.

Ch. VIII. s. 8. When once the amount is settled by the Court, it can only, apparently, be varied on appeal (*d*).

Permanent alimony, principles of Ecclesiastical Courts followed.

In granting permanent alimony in cases which were formerly within the cognizance of the Ecclesiastical Courts, the Court of Divorce follows, and is guided by, the rules and principles which prevailed in those Courts (*e*). The petition may be filed after the final decree (*f*); the amount allotted is larger than that allowed *pendente lite*, and may amount to, but must not exceed, a moiety of the joint income (*g*). The conduct of the parties (*h*), the means possessed by the wife (*i*), and the necessary expenses incurred by the husband in earning his income (*k*), will all be taken into account; but in the absence of proof that the husband's income has altered, the income, on which alimony *pendente lite* was granted, will be taken as the basis for the permanent alimony (*l*). If it has diminished, he should bring the fact before the Court on affidavit (*m*); if the wife desires to show it has increased, or that her own means have diminished, she should file a petition to that effect (*n*).

Is given from date of decree.

Permanent alimony is generally given from the date of the decree. The Court will not order a husband to execute a deed charging his property with the payment of permanent alimony (*o*); but where his conduct was considered to render it necessary, he was ordered to secure to his wife the payment of a sum absolutely (*p*); the Court will, moreover, restrain him from dealing with his property so as not to leave sufficient

A sum may be given absolutely.

(*d*) *Smith v. Smith* (1898), 79 L. T. 366.

(*e*) *Haigh v. Haigh* (1869), L. R., 1 P. & M. 709.

(*f*) *Covell v. Covell* (1872), L. R., 2 P. & M. 411.

(*g*) *Haigh v. Haigh* (1869), L. R., 1 P. & M. 709; *Theobald v. Theobald* (1889), 15 P. D. 26; Rules of Divorce Court, 189 *et seq.*

(*h*) *Gooden v. Gooden*, (1892) P. 1, C. A.

(*i*) *Eaton v. Eaton* (1870), L. R., 2 P. & M. 51.

(*k*) *Hanbury v. Hanbury*, (1894)

P. 315, C. A.; *Louis v. Louis* (1866), L. R., 1 P. & M. 230.

(*l*) *Greenwood v. Greenwood* (1863), 32 L. J., P. & M. 136; *Moore v. Moore* (1864), 3 S. & T. 606.

(*m*) *Davies v. Davies* (1863), 32 L. J., P. & M. 152.

(*n*) *Bishop v. Bishop*, (1897) P. 138, C. A.; *Fisk v. Fisk* (1862), 31 L. J., P. & M. 60.

(*o*) *Hyde v. Hyde* (1865), 34 L. J., P. & M. 63; 4 S. & T. 80.

(*p*) *Morris v. Morris* (1862), 31 L. J., P. & M. 33.

security (g), and will authorize sequestrators to receive portions of a pension in order to enforce payment of alimony (r). Upon the insolvency of a husband entitled to a pension the Bankruptcy Court, by virtue of sect. 53 (sub-sect. 2) of the Bankruptcy Act, 1883, has jurisdiction, after arrangement with the wife, to vary an order for permanent alimony (s). Where the parties are separated because of the cruelty of the wife, alimony was formerly not granted (t). Ch. VIII. s. 8.

A wife who has agreed to a sum for separate maintenance is not thereby precluded from obtaining permanent alimony after a divorce granted for offences committed after the agreement (u).

An order for alimony makes the wife a judgment creditor of the husband (x). In the case of *Kerr v. Kerr*, it was, however, held that arrears of alimony accrued before the making of a receiving order were not provable in bankruptcy (y). Savings out of alimony can be disposed of by will (z). But alimony itself is not assignable (a). An order makes the wife a judgment creditor.

As a general rule, a husband is liable for his wife's costs, and he must pay all the reasonable costs of conducting his wife's case (b). The law assumed that all the property of the wife passed to her husband, so that in many cases the wife not only does not pay costs, but she litigates at the expense of her husband; but if she has separate property, there is no reason why she should not be made to pay costs like any other suitor (c). Liability of husband for wife's costs.

(g) *Waterhouse v. Waterhouse*, 111, 203; *Wilkinson v. Wilkinson* (1893) P. 284, C. A. (1893), 69 L. T. 459; *Morrall v. Morrall* (1881), 6 P. D. 98.

(r) *Sansom v. Sansom* (1878), 4 P. D. 69; *Dent v. Dent* (1867), L. R., 1 P. & M. 366. If the pension is not assignable, no order will be made: *Birch v. Birch* (1883), 8 P. D. 163. (x) *Oliver v. Lowther* (1880), 42 L. T. 47; but see *Bailey v. Bailey* (1884), 53 L. J., Q. B. 583, C. A. (y) (1897) 2 Q. B. 439.

(z) *Moore v. Barber* (1865), 34 L. J., Ch. 667. (a) *Robinson, In re* (1884), 27 Ch. D. 160.

(t) *Dart v. Dart* (1863), 32 L. J., P. & M. 125; 3 S. & T. 208. See, however, *Prichard v. Prichard* (1864), 3 S. & T. 523; and in case of a guilty wife, *Gooden v. Gooden*, *supra*. (b) *Wells v. Wells* (1859), 1 S. & T. 308; *Chetwynd v. Chetwynd* (1865), 34 L. J., Mat. 65. (c) *Milne v. Milne* (1871), L. R., 2 P. & M. 202; *Miller v. Miller* (1869), L. R., 2 P. & M. 13.

(u) Rules of Divorce Court, 110,

Ch. VIII. s. 8.

Deposit or
security by
husband
required.

In the Ecclesiastical Courts the wife was entitled to have her costs taxed *de die in diem*, and the practice in those Courts, where the evidence was taken by affidavit, was to tax and pay the wife's costs before trial, without limiting the amount to any sum deposited by the husband as security (*d*). According to the present practice, the husband is required to deposit in Court or to give security for a sum of money to answer the wife's costs properly incurred (*e*); but as the object of the Court is to protect the wife and not the wife's solicitor, an application for security for costs, after a solicitor has ceased to act for her, will not be entertained (*f*), and a similar rule applies in the case of an abortive trial (*g*); and when the decision is against the wife, no costs of or incidental to the hearing or trial are to be allowed against the husband, except such as may be applied for and ordered to be allowed by the judge at the hearing or trial (*h*). This rule gives the Court a reasonable discretion in the matter of costs, but even if the wife fail in a suit, costs ought only to be refused to her where her solicitor has instituted an unreasonable suit (*i*); but no order will be made for security for costs upon a motion for a new trial (*k*). And the Court of Appeal held that where a husband obtained a decree *nisi* for a divorce, still he ought to pay all his wife's costs properly incurred in defending herself (*l*); but if application is made for the payment of the full costs of a wife who has been found guilty, the Court will postpone its decision until her costs have been taxed (*m*). The husband has, moreover, in such cases, subject to the discretion of the Court (*n*), a right to claim from a co-respondent

(*d*) *Keats v. Keats* (1859), 1 S. & T. 334; 28 L. J., P. & M. 57; *Robertson v. Robertson* (1881), 6 P. D. 119; *Smith v. Smith* (1882), 7 P. D. 227.

(*e*) Rules of the Divorce Court, 158.

(*f*) *Nairne v. Nairne* (1901), J. P. 777.

(*g*) *Waudby v. Waudby* (1901), 84 L. T. 829, C. A.

(*h*) Rules of the Divorce Court, 159.

(*i*) *Kay v. Kay*, (1904) P. 382; *Townson v. Townson* (1898), 78 L. T. 54; *Flower v. Flower* (1873), L. R., 3 P. & M. 132.

(*k*) *Rickaby v. Rickaby*, (1901) P. 134, C. A.

(*l*) *Robertson v. Robertson* (1881), *supra*.

(*m*) *Smith v. Smith* (1882), 7 P. D. 84.

(*n*) *Robinson v. Robinson* (1898), 78 L. T. 391.

those costs which have been reasonably incurred by him in Ch. VIII. s. 8. prosecuting his suit (*o*). But such costs are limited to the particular matter in which the co-respondent is concerned, and will not include, in the case of cross-petitions, the whole costs of the litigation (*p*).

Where, however, there is condonation by a husband after he has obtained a decree *nisi*, such condonation does not relieve a co-respondent from liability for costs (*q*).

Where, however, there has been condonation, before coming to trial, without knowledge of the wife's solicitor, the solicitor is entitled to his taxed costs (*r*).

A wife who has obtained a decree *nisi* with costs is entitled to enforce payment of those costs, notwithstanding the intervention of the King's Proctor, before it is made absolute (*s*); and a pauper petitioner who is unsuccessful in such case is liable to be condemned in the full costs of the intervention (*t*). An application for the wife's costs can be entertained in a meritorious case after the trial if there are special grounds for the delay (*u*). If the wife has separate property, the rule no longer remains the same, for the Court has power to order a wife who is petitioner to give security for costs (*x*). A wife possessing separate property, who failed in her suit for a judicial separation, was not allowed costs, although security had been given (*y*); and in a suit for restitution of conjugal rights, a wife possessing separate property was held liable for her own costs (*z*).

Costs where
wife has
separate
property.

(*o*) *Bilby v. Bilby*, (1902) P. 8;
Townson v. Townson (1898), 78 L. T.
54.

(*p*) *Forbes - Smith v. Forbes-
Smith*, (1901) P. 258.

(*q*) *Hyman v. Hyman*, (1904) P.
403.

(*r*) *Ballance v. Ballance* (1899), 2
Ir. R. 128.

(*s*) *Gladstone v. Gladstone* (1875),
L. R., 3 P. & M. 260.

(*t*) *White v. White*, (1898) P. 124.

(*u*) *Somerville v. Somerville* (1867),
36 L. J., P. & M. 87; *Conradi v.
Conradi* (1866), L. R., 1 P. & M.
163.

(*x*) *M. v. De B.* (1864), 33 L. T.
263. In cases of "restraint upon
anticipation," see Married Women's
Property Act, 1893.

(*y*) *Heal v. Heal* (1867), 36 L. J.,
P. & M. 62.

(*z*) *Holmes v. Holmes* (1755), 2
Lee, 90.

SECTION IX.

SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895.

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The Summary Jurisdiction (Married Women) Act, 1895 (*a*), as amplified by sect. 5, sub-sects. 1 and 2, of the Licensing Act, 1902 (*b*), which extends the relief given by the Act, in cases of habitual drunkenness, to husbands as well as wives, affords a facile method by which a wife (or a husband, in the case of a habitually drunken wife) may obtain a separation order, with custody of the children and (where the wife is the applicant) the payment of a weekly sum (maximum 40s.) for maintenance in cases in which it is shown the husband or the wife is a habitual drunkard, within the meaning of sect. 3 of the Habitual Drunkards Act, 1879 (*c*), or else that the husband has—

- (A) Been convicted of an aggravated assault upon his wife (*d*);
- (B) Been guilty of persistent cruelty to her;
- (C) Been guilty of wilful neglect to provide reasonable maintenance for her, or her infant children, whom he is legally bound to maintain, including illegitimate children of the wife born before the marriage (*e*).

In any of the above cases (when the offence charged has caused the wife to leave and live separately and apart from her husband) upon application by her to any Court of Summary Jurisdiction, within the district in which such conviction was

(*a*) 58 & 59 Vict. c. 39, repealing the Married Women (Maintenance in Case of Desertion) Act, 1886, and sect. 4 of the Matrimonial Causes Act, 1878.

(*b*) 2 Ed. 7, c. 28.

(*c*) 42 & 43 Vict. c. 19.

(*d*) Within the meaning of 24 & 25 Vict. c. 100, s. 43.

(*e*) 4 & 5 Will. 4, c. 76, s. 57.

made or such persistent cruelty or neglect took place, the Court Ch. VIII. s. 9. may make such order, for separation, custody of children, and payment of a weekly sum (not exceeding 2*l.*) for maintenance, together with costs, as may, in its opinion, appear just and reasonable; such weekly sum and costs to be recoverable by distress or commitment (*f*).

But in no case, except where condonation or connivance is shown, shall an order be made in favour of a wife who has committed adultery (sect. 6).

The Act further provides (sect. 7) for a variation or discharge of the order upon proof of an alteration in the husband's means, or upon a resumption of cohabitation between the parties.

All applications under this Act are to be made in accordance with the procedure enjoined under the Summary Jurisdiction Acts, and consequently must be made within six months after the offence charged was committed (*g*). In the case of the conviction of a husband for an aggravated assault upon his wife, her application may, by leave of the Court, be made by summons to be issued and made returnable immediately upon such conviction.

The payment of any sum ordered by way of maintenance under this Act may be enforced by distress, or in default of distress by imprisonment, without hard labour, for a term varying with the amount of the debt, but in no case exceeding three calendar months (*h*).

It is further provided that a Court of Summary Jurisdiction may, in its discretion, refuse to deal with an application when, in its opinion, the matter could be more conveniently decided by the High Court. A right of appeal against any order, or refusal to grant an order, lies from a Court of Summary Jurisdiction to the Probate, Divorce and Admiralty Division of the High Court.

During the ten years that have elapsed since this Act has formed part of the statute law of the realm, it has been elucidated

(*f*) 35 & 36 Vict. c. 65, s. 4.

(*g*) See 11 & 12 Vict. c. 43, s. 11.

(*h*) 35 & 36 Vict. c. 65, s. 4.

Ch. VIII. s. 9. by a number of judicial decisions of the High Court, which may be summarised as follows:—

Habitual drunkenness. No entirely satisfactory definition of habitual drunkenness, for the purposes of the various Acts of Parliament dealing therewith, has yet been given.

The term “habitual drunkard,” as used in sect. 3 of the Habitual Drunkards Act of 1879, is there stated to mean “a person who, not being amenable to any jurisdiction in lunacy, is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself and his or her affairs.”

It is submitted that the above extract from the interpretation clause of the Act of 1879 is unsatisfactory and elusive, because, while it defines the results of habitual intemperate drinking, it does not, in terms, define what (for statutory purposes) constitutes a habitual drunkard.

It is not, however, apparently necessary for the purposes of sect. 3 of the Act of 1879, that a person should be continually drinking in order to be judicially regarded as a habitual drunkard: periodically recurring fits of intemperance, with intervals of sobriety, having been held, in a recent decision of the High Court, sufficient evidence of habitual drunkenness to justify the grant of an order under the Summary Jurisdiction (Married Women) Act, 1895 (*i*).

Aggravated assault.

An attempt to murder (even if the charge be subsequently reduced to one of common assault) does not constitute “an aggravated assault” for the purpose of obtaining a maintenance order under this Act (*k*).

Persistent cruelty.

Persistent cruelty, so as to give justices jurisdiction, may be shown by a series of distinct assaults in the course of a single day, when such assaults are separated by so long an interval of time as to show that they are not the result of one uninterrupted fit of anger or of one quarrel between the parties (*l*).

(*i*) *Robson v. Robson* (1904), 68 J. P. 522.

J. P. 417.

(*l*) *Broad v. Broad* (1898), 78 L. T.

(*k*) *Rex v. Corrigan* (1898), 62 687.

Apparently, moreover, a single act of cruelty on one day, Ch. VIII. s. 9. when coupled with antecedent acts of cruelty committed during a lengthened period, will justify the making of an order (m): provided the complaint be made within six months of the commission of the last offence (n).

As a necessary preliminary to the making of an order under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, upon the ground of wilful neglect to maintain, some evidence of means must be given, it being essential for the Court to be satisfied that the husband either is in receipt of actual earnings or else has the capacity to make a livelihood (o). Wilful neglect to maintain.

Where, however, such evidence of capacity is forthcoming, the Court has power to make an order, although the cohabitation and subsequent wilful neglect to maintain, which gave it jurisdiction, took place after a long period of separation (p).

Desertion (with its usual concomitant of wilful neglect to maintain) necessarily pre-supposes an antecedent cohabitation. Consequently, where there has never been actual cohabitation between a husband and his wife, there can be no desertion for the purposes of this Act. But cohabitation, so as to give the Court jurisdiction, does not necessarily imply that the parties have lived together continuously under the same roof, it having been held that a husband visiting and sleeping with his wife (a domestic servant) in the house of her mistress is sufficient cohabitation for the purposes of the Act (q). Desertion.

But in order to constitute the offence of desertion, and to entitle the wife to an order, the cohabitation must have been put an end to by some overt and decisive act of the husband, such as selling the furniture, closing the house, or turning his wife out of doors (r).

The mere fact of a husband telling his wife in the heat of a domestic quarrel that she may go where she likes or do what

(m) *Lane v. Lane*, (1896) P. 133.

(n) *Ellis v. Ellis*, (1896) P. 251.

(o) *Earnshaw v. Earnshaw*, (1896) P. 160.

(p) *Snape v. Snape* (1900), 64 J. P. 793.

(q) *Bradshaw v. Bradshaw*, (1897)

P. 25; *Huxtable v. Huxtable* (1899), 68 L. J. P. 83.

(r) *Brown v. Brown* (1898), 79 L. T. 802.

Ch. VIII. s. 9. she likes, is not sufficient ground for the wife leaving her husband, and should she do so, the Court will not be justified in making an order (s).

It has been further held, that the refusal of a husband to live with his wife will not give justices jurisdiction to adjudicate on the matter when the conduct of the wife is shown to be such as to render it impossible for the husband to cohabit with her, the cessation of cohabitation under such circumstances not amounting to desertion (t).

Nor will the cessation of an agreed allowance by a husband, in the case of a married couple who have for years lived separately by mutual consent, entitle the wife to a separation order under the Act upon the ground that she has been compelled to live separately and apart from her husband because he has neglected to maintain her, the mere neglect to pay the alimony agreed upon not sufficing to reinstate the parties in the position they occupied before separating, and the original separation being stale under sect. 11 of the Summary Jurisdiction Act, 1848 (u).

And where a wife has sufficient ground for obtaining an order under the Act, if she subsequently enter into a valid deed of separation, the effect of such deed is to put an end to the theretofore existing desertion, and to exhaust the ground of complaint (x).

Condonation. A similar result accrues from condonation, even where an order has been obtained, condonation by voluntary cohabitation deleting the cause of complaint.

Thus, where a wife who complained of desertion within the meaning of the Act, during an adjournment of the hearing resumed cohabitation, and subsequently, but before the date of the adjourned hearing, again separated and obtained an order, the Probate Division of the High Court held upon appeal that such order must be discharged (y).

(s) *Charter v. Charter* (1901), 84 L. T. 272.

(t) *Frowd v. Frowd*, (1904) P. 177.

(u) *Roustands v. Roustands* (1902), 86 L. T. 125.

(x) *Piper v. Piper*, (1902) P. 198.

(y) *Williams v. Williams*, (1904) P. 145.

The subsequent adultery of the wife automatically discharges an order for her maintenance, even where it is shown by the finding of the Court that the husband has been guilty of conduct conducing to such adultery (z). Ch. VIII. s. 9.
Adultery of wife.

It has been held that Courts of Summary Jurisdiction, in assessing the amount that a husband is to be ordered to pay for the support of his wife, should be guided by the principles and practice upon which alimony is awarded, in cases of judicial separation, by the High Court. Amount of allowance.

Consequently, where there are no children of the marriage, or where there are children, and the wife has not to support them, should she have no means of her own, she should be allotted one-third of her husband's net income.

Or, if she have separate property, her income is to be made up, after reckoning the sum derived from such separate property, to one-third of the joint incomes (a).

In estimating the respective incomes of the husband and wife for this purpose, a voluntary allowance made to either of the parties is to be taken into account (b).

As already stated, evidence that the husband is actually capable of earning a livelihood is a condition precedent to the making of an order under the provisions of the Summary Jurisdiction (Married Women) Act, 1895. It has, however, been held, that where a relation of the husband had undertaken voluntarily to pay a certain sum weekly to the wife, such voluntary undertaking was evidence of means upon which justices might make an order upon the husband for that amount, subject to a subsequent variation or discharge upon fresh evidence (c). Evidence of means.

Where the wife has children by a former marriage, a husband separated from her under the provisions of this Act is liable for their maintenance (d). Children of former marriage.

(z) *Ruther v. Ruther*, (1903) 2 K. B. 270.

(a) *Cobb v. Cobb*, (1900) P. 294.

(b) *Nott v. Nott*, (1901) P. 241.

(c) *Walton v. Walton* (1900), 64 J. P. 264.

(d) *Hill v. Hill*, (1902) P. 140.

Ch. VIII. s. 9.

PRACTICE.

Notes of
evidence.

Upon the hearing of every summons under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the magistrate or justices to make a note, not only of the evidence and of the decision, but also of the grounds upon which the Court arrived at such decision, and to furnish a copy of the note upon the application of either party (*e*).

In cases of appeals under the Act, it is the duty of the appellant to supply, for the use of the Court, two copies of the notes taken by the clerk of the Court below, and the costs of such copies will be allowed on taxation (*f*).

Time limit
for pro-
ceedings.

In every case under this Act, complaint must be made within six months after the happening of the offence charged, but for the purpose of proceedings for desertion, under sect. 4, as the desertion of a married woman by her husband is a continuing offence, proceedings need not be initiated within six months from the commencement of such desertion (*g*).

Ouster of
jurisdiction.

A technical objection will oust the jurisdiction, nor is such objection avoided by an omission on the part of the defence to take the point on the hearing of a summons under the Act.

Where, therefore, a summons has been withdrawn, such withdrawal has the effect of putting an end to the complaint in respect of which it was issued, and after such withdrawal no fresh proceedings can be initiated in respect of the same offence (*h*).

Nor is there either jurisdiction or desertion within the meaning of this Act, in cases where the parties have executed a valid deed of separation (*i*).

Form of
order.

When adjudicating, the justices must find as a fact, and include as a finding in the order, that the particular offence charged was committed (*k*).

- (*e*) *Cobb v. Cobb*, (1900) P. 145. (*h*) *Pickavance v. Pickavance*,
 (*f*) *Walton v. Walton*, (1900) P. 147; *Harling v. Harling* (1896), 74 L. T. 559. (1901) P. 60.
 (*i*) *Piper v. Piper*, (1902) P. 198.
 (*k*) *Brown v. Brown* (1898), 79 L. T. 102.
 (*g*) *Heard v. Heard*, (1896) P. 188.

Thus, in allotting maintenance to a wife, the order should Ch. VIII. s. 9. recite the conviction on the face of it (*l*).

Where, however, there has been an irregularity in the form of the order, there is jurisdiction in the High Court to substitute a fresh order in place thereof (*m*).

Where proceedings, before a Court of Summary Jurisdiction, terminate in favour of the defendant, without any provision by the Court as to costs, the solicitor acting for the applicant is not entitled to recover his professional charges from the husband of the complainant for whom he has been acting (*n*). Costs in unsuccessful summary proceedings.

Fresh evidence within the meaning of sect. 7 of the Act of 1895, in order to confer jurisdiction to rescind an order previously made under sect. 4, must be such as would afford ground for a new trial in any other suit or matter, and must, in addition, be evidence not reasonably available at the date of the making of the original order, or else must relate to something which has happened since the making of such original order (*o*). Fresh evidence.

A refusal by justices to allow counsel to cross-examine the complainant, or to call evidence on his behalf, showing that, short of adultery, the wife's conduct justified the husband in leaving her, is ground for a new trial (*p*). Grounds of appeal.

There is no power in a Court of Summary Jurisdiction to state a case under the Act of 1895 for the opinion of the King's Bench Division of the High Court on a point of law arising out of an application for an order under the Act. The only method in which the decision of such a Court can be impugned is by an appeal to the Probate Division of the High Court under sect. 11 of the Act (*q*). Courts to which appeal must be made.

But as the decision of a Court of Summary Jurisdiction upon an information or complaint, alleging that arrears of payment are due under such an order, is not a matter within sect. 11, the

(*l*) *Wilcox v. Wilcox* (1902), 66 J. P. 166.

(*m*) *Brown v. Brown* (1898), 79 L. T. 102; and see R. S. C., Ord. LIX. rr. 4a and 7.

(*n*) *Cale v. James*, (1897) 1 Q. B. 418.

(*o*) *Johnson v. Johnson*, (1900) P. 19.

(*p*) *Frowd v. Frowd*, (1904) P. 177.

(*q*) *Manders v. Manders*, (1897) 1 Q. B. 475.

Ch. VIII. s. 9. Court has power in such circumstances to state a case for the opinion of the King's Bench Division upon a point of law arising out of such an information (r).

Costs of
appeal.

A successful appeal by a husband from the decision of a Court of Summary Jurisdiction may, nevertheless, carry costs against him (s), upon the ground that a wife is entitled to costs necessarily incurred by her in supporting the order on appeal (t).

(r) *Ruther v. Ruther*, (1903) 2 K. B. 270. (t) *Medway v. Medway*, (1900) P. 141; *Huxtable v. Huxtable* (1899),

(s) *Charter v. Charter* (1901), 84 L. T. 272; *Pickavance v. Pickavance*, 68 L. J. P. 83; *Earnshaw v. Earnshaw*, (1896) P. 160. (1901) P. 60.

Part Second.

Showing the Operation of General Rules when affected by Special Stipulation.

CHAPTER IX.

ANTE-NUPTIAL AGREEMENTS.

SECTION I.

OF PROMISES TO MARRY.

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HAVING discussed the Rights and Liabilities of Husband and Wife according to the general Law of the Land, we now proceed to consider those Rights and Liabilities when controlled or affected by special stipulation. And here it may be observed, that the parties to marriage contracts (as, indeed, to other contracts) will take by law all the rights, and will be under all

Ch. IX. s. 1. the liabilities, from which special stipulation does not exclude them. So that, in considering cases of special stipulation, it will be necessary to keep constantly in view those "general rules" which have been discussed in the first part of this treatise.

Special stipulations may be either by ante-nuptial or by post-nuptial agreement.

Distinction
between pro-
mises to
marry and
promises in
consideration
of marriage.

To begin, then, with ante-nuptial agreements—the Statute of Frauds, sect. 4, enacts:—

That no action shall be brought whereby . . . to charge any person upon any agreement made upon consideration of marriage . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

And yet a promise *to marry* (which in this respect is very distinguishable from a promise *in consideration of marriage*), is binding, although merely verbal (*a*).

The ground of this distinction, though solid, is not immediately apparent (*b*). For the purpose of elucidation, therefore, a few words may be said respecting promises to marry, before entering on the examination of promises and agreements in consideration of marriage.

Promises to marry, however expressed, and whether oral or written, always point at one object—an object definite and certain. Consequently, there never can be any difficulty in saying what it is that the promising parties are to perform. This is perhaps one reason why the law is satisfied with parol proof of a promise to marry. Another reason seems to be, that to insist on having written evidence, would, in many instances, prove an encouragement to perfidy. Be this, however,

(*a*) *Cork v. Baker* (1763), 1 Str. 34 and 63; *Harrison v. Cage* (1698), 1 Raym. 386. By these cases it has been decided that an agreement between two persons to marry is not an agreement in consideration of marriage, but that these terms are confined to promises to do something in consideration of marriage,

other than the performance of the contract of marriage itself.

(*b*) "It would certainly strike any one (except perhaps a lawyer) that a promise by a woman to marry a man, in consideration of his promising to marry her, was an agreement made in consideration of marriage."
—*Smith on Contracts*.

as it may, nothing is better established now (c) than that a parol or verbal promise to marry is binding. But specific performance cannot be compelled, the sole remedy for breach of a promise to marry being the recovery of damages for non-performance. And such damages are alike recoverable, whether the promise be established by oral testimony or by written evidence.

Ch. IX. s. 1.

Remedy on promise to marry.

This remedy by way of damages for breach of promise (which many think a discredit to our institutions) is not of very ancient date in the law (d). It seems to have been unknown to Lord C. J. Vaughan (who presided in the Court of Common Pleas from 1668 to 1674); for we find that eminent judge expressing a doubt whether *any* action could be maintained on mutual promises to marry (e). Such promises are not to be confounded with the ancient promise of marriage *de futuro cum copulâ*, which, as we have seen, gave ground for a suit in the Spiritual Court to compel solemnization *in facie ecclesiæ* (f); for the promise *de futuro cum copulâ* constituted *ipsum matrimonium*; whereas a promise to marry in modern times acquires no additional force from a *copula*, and, since the passing of Lord Hardwicke's Act (g), is neither in itself a marriage, nor warrants any ecclesiastical process to compel solemnization.

Remedy not of ancient date.

In short, it warrants nothing but an action at law for the recovery of damages when a breach has been committed. Moreover, where no special damage is alleged, by which term is

(c) This was not so always; for not long after the passing of the Statute of Frauds, it was decided that a promise to marry (like a promise in consideration of marriage) must be in writing and signed. See *Philpot v. Wallet* (1683), 3 Lev. 65. But that case is no longer law.

(d) On May 6th, 1879, Mr. (afterwards Lord) Herschell moved a resolution in Parliament to the effect, "That in the opinion of this House, the action of breach of promise of marriage ought to be abolished except in cases where

actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss."

(e) *Holt v. Ward Clarendieux* (1732), 2 Str. 937. The action of crim. con. is apparently more modern still; the first instance being that of the *Duke of Norfolk v. Sir J. Jermayne*, in 1692. See Lord Campbell's "Lives of the Chancellors," vol. iv. p. 106.

(f) See *ante*, p. 5.

(g) See *ante*, p. 7.

Ch. IX. s. 1. meant damage to property and not to the person, it must be brought during the lifetime of the promisor, the right of action not surviving against his personal representatives (*h*).

But during the lifetime of the promisor allegations of seduction add to the gravamen of the breach, and are material facts within the meaning of Ord. XIX. r. 4 (*i*).

Parties to action competent to give evidence.

By 32 & 33 Vict. c. 68, it is provided that the parties to any action for breach of promise of marriage shall be competent to give evidence in such action, and it also enacts, that no plaintiff in such an action shall recover unless his or her testimony shall be corroborated by some other material evidence in support of the promise (*k*).

Corroboration.

But letters by a plaintiff to a defendant averring a promise by him, to which he did not reply, are no corroboration, by acquiescence, within the meaning of sect. 2 of this Act (*l*).

Promise to marry simply.

A promise to marry, without more, means a promise to marry within a reasonable time; otherwise no breach could be assigned (*m*).

Conditional promise.

A conditional promise must be laid as such; and it must be shown that the condition has been performed (*n*). Where, however, before the happening of the condition, there was an absolute refusal on the part of the promisor to fulfil his promise when the event should happen, it has been held action will lie (*o*).

Expressions of intention.

Expressions of intention in the hearing of third persons will not support an action, unless authorized to be communicated; and then they will amount to a promise (*p*).

It is a general rule in all contracts that both parties must be

(*h*) *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

(*i*) *Millington v. Loring* (1880), 6 Q. B. D. 190, C. A.; and see *Berry v. Da Costa* (1866), L. R., 1 C. P. 331. As to the measure of damages in certain notable cases of breach of promise of marriage, see Chitty on Contracts, 14th ed. p. 477.

(*k*) *Hickey v. Campion* (1872),

Ir. R., 6 C. L. 557; *Bessela v. Stern* (1877), 2 C. P. D. 265.

(*l*) *Wiedemann v. Walpole*, (1891) 2 Q. B. 534, C. A.

(*m*) *Potter v. De Boos* (1815), 1 Stark. Ca. 82.

(*n*) *Cole v. Cottingham* (1837), 8 Car. & P. 75.

(*o*) *Frost v. Knight* (1872), L. R., 7 Ex. 111.

(*p*) *Cole v. Cottingham*, *supra*.

bound, or neither. Therefore, where an action is brought for breach of a marriage promise, acceptance of the promise must be alleged and proved. But this acceptance may be established by conduct and action as well as by words (*q*). Ch. IX. s. 1.
Acceptance necessary.

However, it seems necessary, before bringing an action, to make a tender of performance on the part of the promisee. The maker of the promise should be required to fulfil it. The requisition, however, need not be by the female plaintiff. If made by her father it will suffice (*r*). Tender of performance by plaintiff.

The maker of the promise may, in the meantime, have married another. In such a case, it is no defence to say that he was never requested to perform his promise, he having, by his marriage, put himself in a situation which rendered performance impossible (*s*). Nor will the fact that the promisor, at the time of making the promise, was already married excuse him (*t*). When defendant has married another.

But suppose him to contend that, should his wife die leaving him surviving, he may still be able to perform his promise, "within a reasonable time." That likewise is no defence; for the Court will not presume that his wife is to die within a "reasonable time," or even in his lifetime (*u*).

If the man, after the promise, discover that the woman is unchaste, he may refuse to marry her (*x*). But if her frailties were known to him at the time of the promise, he cannot plead them as a defence to an action (*y*). Discovery that the woman is unchaste.

How far bad health on the part of the plaintiff seeking damages is a defence to the action, the Courts have more than once had occasion to consider. In *Atchinson v. Baker* (*z*) (a case How far bad health a defence.

(*q*) *Gough v. Furr* (1827), 2 Car. & P. 631; *Harvey v. Johnston* (1848), 17 L. J., C. P. 298; *Hutton v. Mansell* (1705), 6 Mod. 172.

(*r*) *Ibid.*

(*s*) *Caines v. Smith* (1846), 15 M. & W. 189. See also *Short v. Stone* (1846), 8 Q. B. Rep. 358, where it was held not necessary to aver that the other woman whom the defendant had married was still living, he having, by his marriage,

broken his contract with the plaintiff.

(*t*) *Wild v. Harris* (1849), 7 C. B. 999; *Millward v. Littlewood* (1850), 5 Ex. 775.

(*u*) *Caines v. Smith* (1846), 15 M. & W. 189.

(*x*) *Bench v. Merrick* (1844), 1 Car. & Kir. 463; *Beachey v. Brown* (1860), 1 E. B. & E. 796.

(*y*) *Ibid.*

(*z*) (1797), Peake, Ad. Ca. 103, 104.

Ch. IX. s. 1. in which the man was plaintiff and the woman defendant), it appeared that when she gave her promise the plaintiff seemed in good health; but she afterwards discovered that he had an abscess on his breast, and for that reason she refused to marry him. Lord Kenyon held that she was justified.

It is the duty of the man, in such circumstances, to disclose his malady. If he conceal it, he ought not to be allowed to recover damages. But there is no duty to disclose that the party had at one time been of unsound mind (a).

The woman, too, is bound to a like degree of candour. But this, of course, does not imply that the parties are to divulge every little insignificant personal peculiarity to which each may be subject. The obligation must be viewed with reference to the reason of the thing, having a due regard to the objects of matrimony, and the endurance and closeness of the connexion. A woman knows that she and her children will be dependent on her husband in the married state. She has, therefore, a right to find him sound, unless, when she promised, she knew of his blemishes or defects. But objections of this kind must not be fanciful or speculative.

In *Hall v. Wright* (b), the majority of the Court of Exchequer Chamber held, that a party cannot set up as an excuse for breach of promise to marry that the performance of the conjugal duties would be dangerous to his life, and that such a plea discloses no good defence to the plaintiff's claim for damages; for it is for the woman to say whether she will in such a case enforce or renounce the contract (c).

The better opinion now appears to be that no infirmity, bodily or mental, which may supervene or be discovered after the making of a contract to marry, unless it be *incapacity* on the part of the man or *want of chastity* on the part of the woman, can be relied upon by either as a ground for refusing to perform such contract (d).

Defendant a
married man

The fact that the defendant was married to another woman at

- (a) *Baker v. Cartwright* (1861), L. R., 4 C. P. 1, at p. 8.
 10 C. B., N. S. 124. (d) See *Hall v. Wright* (1858),
 (b) (1858), E. B. & E. 746. E. B. & E. 746; *Baker v. Cart-*
 (c) See *Boast v. Firth* (1868), *wright* (1861), 10 C. B., N. S. 124.

the time when he made the promise to the plaintiff is no defence to an action for damages for breach of promise of marriage (*e*). The fraudulent procurement of a promise of marriage constitutes, however, a valid defence for its breach (*f*). Ch. IX. s. 1.
at time of
promise—no
defence.

An infant may bring an action against an adult for breach of promise to marry. This was doubted till the determination of the Court of King's Bench in *Holt v. Ward Clarencieux* (*g*), where Lord C. J. Raymond said, that the contract by mutual promises of marriage, one of the parties being an infant, "is not void, but merely voidable at the election of the infant; and, as to the person of full age, it absolutely binds" (*h*). But it must be remembered that an infant's marriage is required by the statute to be with consent of guardians (*i*). So that the want of such consent (when applied for) would most probably be a good defence to an infant's action claiming damages from an adult promisor, because an infant's marriage, without consent of guardians, although not absolutely void, is nevertheless interdicted by the law. Case of plain-
tiff being an
infant.

The Infants' Relief Act, 1874 (*k*), enacts, that no action shall be brought whereby to charge any person upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. It has been decided that this section applies to promises to marry (*l*); but the distinction between a fresh promise made after full age and a mere ratification or recognition of the promise made while a minor, which is consequently void and not merely voidable, may not always be clear or easy of appreciation (*m*). The later case of *Holmes v. Brierly* (*n*) tends, however, to show that the unconditional release of a promise made during infancy is evidence— Infants'
Relief Act.

(*e*) *Wild v. Harris* (1849), 7 C. B. 999; *Millward v. Littlewood* (1850), 5 Ex. 775.

(*f*) *Wharton v. Lewis* (1824), 1 C. & P. 529.

(*g*) (1732), 2 Strange, 937. See 1 Barn. 290.

(*h*) As to void and voidable contracts, see *Fenton v. Livingstone*

(1859), 3 Macq. H. L. C. 497.

(*i*) *Supra*, p. 13.

(*k*) 37 & 38 Vict. c. 62, s. 2.

(*l*) *Coxhead v. Mullis* (1878), 3 C. P. D. 439.

(*m*) *Ditcham v. Worrall* (1880), 5 C. P. D. 410; *Northcote v. Doughty* (1879), 4 C. P. D. 385.

(*n*) (1888), 36 W. R. 795.

Ch. IX. s. 1. where there is a continuation of the engagement—that there has been a new promise by the defendant after attaining his majority.

Actions for breach of promise of marriage are not triable in a County Court (*o*).

Contracts and covenants in restraint of marriage.

Contracts in restraint of marriage are void as being against public policy (*p*); and general conditions prohibiting marriage by which a legacy is cut down are also void if they refer to personal estate or to a mixed fund, but not if they refer to realty (*q*). Particular conditions of restraint are valid as to real estate, and as to personal estate if there be a gift over (*r*).

A covenant, however, to give a woman an annuity of 40% until her marriage, and afterwards only 20%, was held not to be a covenant in restraint of marriage (*s*); and a restriction may be placed on the second marriage of either a man or woman by making the benefit of a bequest, by whomsoever made, determine on a second marriage (*t*).

A reduction of legacy or cessation of life annuity upon legatee not marrying a Jew or marrying a Roman Catholic, or failing to be married in accordance with the ritual of a particular sect, have also been upheld by the Courts (*u*).

And a similar decision was arrived at in the recent case of *Nourse, In re* (*x*), where the payment of a specific legacy, in addition to other provision, was conditional upon the legatee marrying with the consent of the testator's trustees.

It has, however, been held that a legacy conditioned upon the legatee marrying within a certain limited class of freeholders

(*o*) 51 & 52 Vict. c. 43, s. 56; but see sects. 63, 64.

(*p*) *Lowe v. Peers* (1768), 4 Burr. 2225; *Baker v. White* (1690), 2 Vern. 215; and *Hartley v. Rice* (1808), 10 East, 22.

(*q*) *Bellairs v. Bellairs* (1874), L. R., 18 Eq. 510; *Lloyd v. Lloyd* (1852), 2 Sim., N. S. 255; *Bellamy, In re* (1883), 48 L. T. 212.

(*r*) *Jenner v. Turner* (1880), 16 Ch. D. 188; *Jones v. Jones* (1876), 1 Q. B. D. 279; *Topham v. Duke of Portland* (1869), L. R., 5 Ch. 40.

(*s*) *Webb v. Grace* (1848), 2 Ph. 701.

(*t*) *Lloyd v. Lloyd* (1852), 2 Sim., N. S. 255; *Newton v. Marsden* (1862), 2 Johns. & H. 356; *Allen v. Jackson* (1875), 1 Ch. D. 399; *Pyle v. Price*, 6 Ves. 779; *Tricker v. Kingsbury*, 7 W. R. 652.

(*u*) *Hodgson v. Halford* (1879), 11 Ch. D. 959; *Knox, In re* (1889), 23 L. R., Ir. 542, O. A.; *Creagh v. Wilson* (1706), 2 Vern. 571; *Haughton v. Haughton* (1824), 1 Moll. 611.

(*x*) (1899) 1 Ch. 63.

possessed of a rent roll of 500*l.* per annum was void, as leading Ch. IX. s. 1. to a probable prohibition of marriage (y).

MARRIAGE BROCCAGE.

From comparatively early times, although not illegal at common law, Contracts of Marriage Broccage, by which term is meant a contract for reward to procure for another in marriage a husband or a wife, have been regarded by Courts of Equity as things "in no case to be countenanced" (z).

The ethical reasons for discouraging the interposition of a person paid by results in a contract like that of marriage are not far to seek, although their discussion is scarcely germane to a legal text-book.

As regards their legal aspect, Lord Hardwicke said, in *Cole v. Gibson* (a) :—

"To be sure, this Court has been extremely jealous of any contract of this kind made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence (and has been justly so; nothing tending more to introduce improper matches); and by rules established, not regarding whether the match is proper or no, if brought about by a marriage broccage contract, sets it aside; not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation; therefore, though a proper match, . . . yet for the sake of the mischief that would be introduced . . . the Court sets it aside; and if that was the nature of the contract, I do not know that subsequent confirmations have been permitted to stand in the way of the relief sought."

It was at one time thought that the contract was only illegal when it was for the procurement of marriage between certain specified persons, and that a pecuniary payment for the introduction of a person to various possible suitors was not within the mischief contemplated by the earlier decisions.

(y) *Keily v. Monck* (1795), 3 Ridgeway, 205. The following have also been held void as being in general restraint of marriage, or as opposed to public policy: *Underwood v. Morris* (1741), 2 Atk. 184; *Marples v. Bainbridge* (1816), 16

B. R. 271; *Potter v. Richards* (1855), 24 L. J., Ch. 488; *Baker v. White* (1706), 2 Vern. 215.

(z) *Drury v. Hooke* (1686), 1 Vern. 411.

(a) (1750), 1 Ves. Sen. 503, at p. 506.

Ch. IX. s. 1. It has, however, been decided by the Court of Appeal in the recent case of *Hermann v. Charlesworth* (b) (in which most of the older authorities are cited) that the contract is in all cases an illegal one. And consequently that earnest-money paid in respect of a consideration that was in its inception illegal may be recovered back at any time before the happening of the event in respect of which such earnest-money was paid.

SECTION II.

ANTE-NUPTIAL AGREEMENTS—REQUIREMENTS OF THE
STATUTE OF FRAUDS.

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Policy of the statute requiring written evidence of the agreement.

In dealing with agreements, in consideration of marriage, the first thing to be ascertained is whether there has been compliance with the provisions of the Statute of Frauds (c), the 4th section of which requires that such agreements shall be in writing, and signed by the party to be charged therewith. The object of this enactment is to guard against the danger of admitting parol evidence in matters very liable to be misapprehended and misconstrued, and consequently very likely to give rise to

(b) (1905), 21 T. L. R. 368.

(c) 29 Car. 2, c. 3.

perjury and fraud. It may indeed be asked, Are not these Ch. IX. s. 2. consequences just as likely to happen in the case of promises to marry? But promises to marry, as before remarked, are in their nature uniform and certain; whereas agreements in consideration of marriage are of endless variety, and would in almost every case produce a conflict of oral testimony. The policy of the statute is indeed rested on a different basis, in the well-known case of *Montacute v. Maxwell*, before Lord Chancellor Macclesfield. There it was contended that the object of the clause was to protect parties from being bound by those unguarded verbal declarations which are common in courtships, "since in no case can there be supposed so many expressions and promises used, as in addresses in order to marriage, where many passages of gallantry usually occur" (b). But this is somewhat lax morality, which we ought not to attribute to the legislature; for the Act was made, as its preamble declares, not to promote "passages of gallantry," but to repress perjuries and frauds.

The words of the 4th section are as follows:—

"That no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Although these words point at *legal* remedies, they always received the same construction in Courts of Equity as in Courts of Law. Unless, therefore, there be a writing duly signed, no action can be brought to enforce an agreement in consideration of marriage. Of equal force in equity as at law.

The signature of the plaintiff is not necessary. The name to be signed is that of the party charged or his agent. It is not necessary that it should be placed at the end of the document: it is sufficient if it appears in some material governing part of the instrument (c). Rule as to signature of the note or memorandum.

(b) *Montacute v. Maxwell* (1720), 1 P. Wms. at p. 619.

(c) In *Hammersley v. De Biel* (1845), 12 Cl. & Fin. 45, one of the questions was, whether there

was sufficient signature of certain articles to bind the father of the lady. Lord Cottenham said, "The father's name is in one place written at length by one son, and in the

Ch. IX. s. 2.

Necessary that the consideration, as well as the agreement, shall appear in it.

Need not be in a single writing.

It has been decided that the consideration, as well as the promise, must appear in the writing (*d*). The consideration of marriage, however, is a favourite of the law (*e*), which regards that contract as, *per se*, so important and all-sufficient that the amount of pecuniary benefit, moving from either side, is deemed immaterial (*f*). Accordingly, if a father, on his son's marriage, were to convey an estate to him in fee, the son would be considered a purchaser for valuable consideration, although nothing actually lucrative passed to the father (*g*).

The agreement need not be contained in a single writing (*h*). It may be collected from several; provided that the connection and meaning of the whole can be clearly made out without calling in the aid of oral testimony (*i*).

other by initials only, by the other son; and as it is clearly immaterial in what place the signature of the name is to be found, it is, in the terms of the Statute of Frauds, an agreement made in consideration of marriage, of which there is a memorandum or note in writing, signed by a person thereunto lawfully authorized by the party to be charged therewith." See *Caton v. Caton* (1867), L. R., 2 H. L. 127.

(*d*) *Wain v. Warlters* (1804), 5 East, 10; and see *Randall v. Morgan* (1805), 12 Ves. 67, where Sir William Grant says that the 4th section requires the very agreement to be in writing; which he tells us is not necessary in the case of a trust under the 7th section—for it is enough if a trust be *manifested* without being actually *constituted* by writing.

(*e*) "If it be supposed to be necessary to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum, or in the other evidence in the cause, proof of any such contract; but when the autho-

rities on this subject are attended to, it will be found that no such formal contract is required." Per Lord Cottenham, C., in *Hammersley v. De Biel* (1845), 12 Cl. & Fin. p. 61, n.

(*f*) "I do not apprehend that the quantum of pecuniary benefit will affect the question; and I am surprised to find observations about the amount of the penalty, as varying the reciprocity where marriage is one of the considerations." Per Lord Eldon in *Prebble v. Boghurst* (1818), 1 Swan. 319.

(*g*) Per Lord Redesdale, in *O'Gorman v. Comyn* (1804), 2 Sch. & Lef. p. 147.

(*h*) *Montacute v. Maxwell* (1720), 1 P. Wms. 618.

(*i*) *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238; *Baumann v. James* (1868), L. R., 3 Ch. 508; *Long v. Millar* (1879), 4 C. P. D. 450; *Cave v. Hastings* (1881), 7 Q. B. D. 125; *Shardlow v. Cotterell* (1881), 18 Ch. D. 280; 20 Ch. D. 90. The 4th section of the Statute of Frauds, now under consideration, applies to five different contracts. Cases upon it arise most frequently upon con-

It has frequently been decided that an ante-nuptial agreement by parol is not binding where it has merely been acted upon by marriage; in other words, that marriage is not to be regarded as a part performance of an agreement, and, as such, taking the case out of the statute (*k*). But acts of part performance independent of the marriage, such as the delivery of possession of the property in pursuance of the parol agreement, are sufficient to take the case out of the Statute of Frauds (*l*).

Ch. IX. s. 2.

How far verbal promises will be enforced.

In *Lassence v. Tierney* (*m*), Lord Cottenham says: "If marriage were a part performance, there would be an end of the statute; every parol contract followed by marriage would be binding."

Should, however, anyone be induced to marry upon the faith of certain representations (although only parol), equity will relieve, and protect against fraud. And where an agreement for a settlement for a specific amount was made, and the writing was subsequently lost, performance was decreed. Nor will settlement of a smaller sum than was originally contracted for constitute an ademption when there is evidence of fraud on the part of the settlor (*n*).

Cases of fraud.

In *Hammersley v. De Biel* (*o*), Lord Lyndhurst, L. C., asserted it to be "a principle of law, at least of equity, that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them,—if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed and will give effect to the proposal" (*p*).

tracts relative to the sale of real estates, as to which see Sugden, V. & P., Ch. IV.; Dart, V. & P., Ch. VI.

(*k*) See *Moorhouse v. Colvin* (1851), 15 Beav. 341, 349; *Warden v. Jones* (1857), 23 Beav. 487.

(*l*) *Surcome v. Pinniger* (1853), 3 De G., M. & G. 571; *Ungley v. Ungley* (1877), 5 Ch. D. 887.

(*m*) 1 M. & G. 551. See also *Surcome v. Pinniger* (1853), 3 De G., M. & G. 571; *Warden v. Jones* (1857), 23 Beav. 487; 2 De G. & J. 76; *Caton v. Caton* (1867), L. R., 1 Ch. 137; L. R., 2 H. L. 127.

(*n*) *Gilchrist v. Herbert* (1872), 20 W. R. 348.

(*o*) (1845), 12 Cla. & Fin. 45.

(*p*) See Lord Cranworth's obser-

Ch. IX. s. 2.

In a subsequent part of his judgment he said:—

“Would not a Court of Equity enforce the execution of a settlement after marriage, in pursuance of proposals or contract entered into before marriage?”

And Lord Campbell added, that “if *that* were not to be considered as the doctrine of a Court of Equity, the most monstrous frauds would be committed.”

“Some fraudulent father” (said his Lordship) “might hold out to the suitor of his daughter that he meant to make a settlement upon his daughter and her issue. The marriage would take place in the belief that that settlement would be made; and then after the marriage he might say, ‘This was only an intimation of my intention at the time. I have changed my mind, and I will not give her a shilling.’ That would be most unjust; and to prevent such frauds this doctrine has been laid down, and, I think, has been most properly laid down, and ought to be acted upon” (g).

The House of Lords in this case affirmed the decision of Lord Chancellor Cottenham, whose judgment in the Court of Chancery had confirmed upon appeal the decree of Lord Langdale. The case on that appeal is not reported; but a note of Lord Cottenham’s observations in disposing of it was printed for the use of the House of Lords, and admitted by the counsel on both sides to be correct (r). From that note is extracted the following passage which bears on the point now under consideration:—

Remarks of
Lord Cotten-
tenham.

“A representation made by one party for the purpose of influencing the conduct of the other party will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realising such representation. Of this *Hodgson v. Hutchenson* (s), *Cookes v. Mascall* (t), and *Wank-*

ventions on this *dictum* in *Maunsell v. White* (1854), 4 H. L. Cas. 1039, 1056; and Sugden’s *Law of Property*, p. 53.

(g) Lord Campbell here supposes throughout a case of fraud. But it will be observed that Lord Lyndhurst puts the thing more largely, so as apparently to embrace a case of mere verbal inducements held out to a suitor. As to destruction

of marriage articles, see *Halfpenny v. Ballet* (1699), 2 Vern. 373.

(r) (1845), 12 Cla. & Fin. at p. 61.

(s) (1712), 5 Vin. Abr. 522.

(t) (1690), 2 Vern. 200. The report of this case has the following marginal note: “Marriage agreement reduced into writing, though not signed by either party, yet decreed to be performed.”

ford v. Fotherley (u), which last was affirmed by the House of Lords, afford strong instances. In *Luders v. Anstey* (x), a suggestion for consideration, followed by marriage, was held to be binding (y).”

Ch. IX. s. 2.

Perhaps the most important point which was considered to be decided in *Hammersley v. De Biel* was that upon which Lord Langdale had proceeded in the original decree, namely, that marriage is no bar to the provisions of the 4th section of the Statute of Frauds respecting agreements in consideration of marriage being satisfied by *subsequent recognition*. This view appears to have been adopted by Lord Cottenham in the Court of Chancery, notwithstanding doubts more than once judicially expressed upon the question, how far a written undertaking after marriage to perform a parol promise before marriage, could be enforced. In *Hammersley v. De Biel*, a parent on the marriage of his daughter entered, by the agency of his two sons, into an undertaking in writing, to leave his daughter by will 10,000*l*. Relying on this document, and as a part of the arrangement, the intended husband secured for the lady a provision of 500*l*. a year, and the marriage thereupon was solemnized. After the marriage the father wrote a letter, duly signed by him, in which he referred to the prior document. The bill was filed by a son of the marriage against the parent's executor to compel payment of the 10,000*l*. out of his assets.

Satisfaction of the statute by subsequent recognition;

(u) (1690), 2 Vern. 322.

(x) (1799), 4 Ves. 501.

(y) See *Moore v. Hart* (1683), 1 Vern. 201; 2 Rep. Ch. 284; *Halfpenny v. Ballet* (1690), 2 Vern. 373; *Bird v. Blossie* (1695), 2 Vent. 361; *Merry v. Ryves* (1684), 1 Ed. 1; *Madox v. Nowlan* (1824), Beatty, C. C. 632; *Maunsell v. White* (1844), 1 Jo. & Lat. 539; 4 H. L. C. 1039; *Jorden v. Money* (1854), 5 H. L. C. 185; *Crofton v. Ormsby* (1806), 2 Sch. & L. 583; *Bold v. Hutchinson* (1855), 20 Beav. 250; 5 De G., M. & G. 558; *Prole v. Soady* (1868), L. R., 3 Ch. 220; *Cooper v. Wormald* (1859), 27 Beav. 266; *Loxley v. Heath* (1859), 27 Beav. 523; *Wil-*

liams v. Williams (1868), 37 L. J., Ch. 854; *Coverdale v. Eastwood* (1872), L. R., 15 Eq. 121; *Dashwood v. Jermyn* (1879), 12 Ch. D. 776. See also *Denton v. Davies* (1812), 18 Ves. 499; though this was a case where the representations had been made in writing. The dicta in *Hammersley v. De Biel* (1845) appear at first sight to sanction the general doctrine that a parol agreement in consideration of marriage is binding where it has been acted upon; but the remarks of their lordships throughout the case must be regarded as delivered on the assumption of the existence of an agreement in writing.

Ch. IX. s. 2. From the following remarks of Lord Cottenham, it is apparent that he considered the requirements of the statute to have been satisfied no less by the agency of the two sons, than by the parent's subsequent recognition of their proceedings:—

“Assuming for the present that the two brothers of the intended wife were duly authorized by the father to enter into the arrangement with the intended husband, the document containing the proposed arrangement proves that both concurred in what that paper contains; for it is written partly by the one and partly by the other. Independently of this, however, there is the letter of the father, signed by himself, in which he, referring to this document, says, ‘The only question now is, I conceive, what the expression used in the engagement legally implies,’ by which he must be understood to mean that if the expression used amounted to an obligation to pay the 10,000*l.*, he was ready to perform it. I am aware that in *Rundall v. Morgan* (z), Sir William Grant suggests a doubt whether a written promise after marriage to perform a parol agreement made before could be enforced; but in *Hodgson v. Hutchenon* (a), *Taylor v. Beech* (b), and *Montacute v. Maxwell* (c), it was held that such a subsequent written promise would be binding within the statute. It was argued that the two brothers had no authority to enter into this arrangement. But what is conclusive on this point is the letter of the father himself, who, not disputing the authority under which the engagement was made, says the whole question depends on its construction.”

but by other
than the party
chargeable.

This post-nuptial recognition, however, must amount to a part performance of the parol agreement by some person other than the party to be charged therewith, in order to establish it. This is a test the imposition of which would not seem to be justified by the earlier cases (d); but in *Warden v. Jones* (e), Lord Chancellor Cranworth, referring to the decision in *Dundas v. Dutens* (f), that a post-nuptial settlement recited to be made in pursuance of an ante-nuptial parol agreement is good, said, “On that decision I will only remark, that, if it be a correct view of the law, the whole policy of the statute is defeated.” And in *Caton v.*

(z) (1806), 12 Ves. 67. See p. 73.

(a) (1712), 5 Vin. Abr. 522.

(b) (1749), 1 Ves. sen. 297.

(c) (1720), 1 Str. 236.

(d) See the cases cited in *Hammersley v. De Biel* (1845), 12 Cla. &

Fin. 45; and those cited *supra*, p. 245, n. (y); also *Spurgeon v. Collier* (1758), 1 Ed. 54; *Barkworth v. Young* (1856), 4 Dr. 1.

(e) (1857), 2 De G. & J. 76, 85.

(f) (1790), 1 Ves. jun. 196.

Caton (g) the same Lord Chancellor decided, that the ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, there it would be a fraud in the other party to set up the legal invalidity of the contract, on the faith of which he induced or allowed the person contracting with him to act. Ch. IX. s. 2.

The making a will in pursuance of an ante-nuptial parol agreement to do so is no part performance under the statute (g). This of course follows from the general principle. Nor, apparently, does a letter written by a father to his prospective son-in-law, prior to his daughter's marriage, promising her a share of his property upon his decease, constitute a contract enforceable at law against his estate, it being, at the highest, merely an expression of intention (h).

An ante-nuptial parol agreement recited in a post-nuptial settlement would be binding by estoppel on all persons claiming under the settlement (i). But as against creditors (who are not parties to the settlement), it cannot be maintained that such an agreement is a good consideration to support the settlement (k). "Such a doctrine," said Sir Thomas Plumer, "would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties" (l). How far binding.

In view, however, of a recent decision of the Court of Appeal (m) the above statement must be taken with very con-

(g) (1867), L. R., 1 Ch. 137; *S. C.*, L. R., 2 H. L. 127. See *Stroughill v. Gulliver* (1857), 1 De G. & J. 113.

(h) *Fickus, In re, Farina v. Fickus*, (1900) 1 Ch. 331.

(i) *Battersbee v. Farrington* (1818), 1 Sw. 106, 113. See also *Marchioness of Annandale v. Harris* (1727), 2 P. Wms. 432; *Lainson v. Tremere* (1834), 1 A. & E. 792; *Carpenter v. Buller* (1841), 8 M. & W. 209. But such a recital, if proved to be untrue, is not valid: *L'Estrange v.*

Robinson (1824), 1 Hog. 202; *Hogarth v. Phillips* (1838), 4 Dr. 360.

(k) *Goldicutt v. Townsend* (1860), 28 Beav. 445; *Pearon, In re* (1876), 3 Ch. D. 807.

(l) *Battersbee v. Farrington* (1818), 1 Sw. 106, 113. For the opinion of Lord St. Leonards on this subject, see Sugd. on Powers, pp. 649, 650, 8th ed.

(m) *Holland, In re, Gregg v. Holland*, (1902) 2 Ch. 360, C. A.

Ch. IX. s. 2. siderable reservation. It having been held that a post-nuptial settlement, reciting an ante-nuptial parol agreement, was good as against the husband's trustee in bankruptcy, upon the grounds:—(1) That there was no evidence of its having been made with intent to defeat creditors; and (2) that the deed was not "voluntary": the Court considering, with regard to the latter point, that, taken as a whole, it constituted a sufficient note or memorandum in writing of the therein recited parol ante-nuptial contract in consideration of marriage to satisfy the requirements of the 4th section of the Statute of Frauds. It appears probable, however, that in such a case the official receiver would be entitled to the husband's life interest.

Where parol agreement acted upon before marriage.

Where a man so far carried out his parol promise as to actually transfer the subject-matter of the promise before marriage, his post-nuptial settlement was held good against creditors (*n*).

Where parol agreement incomplete.

If the ante-nuptial parol agreement is incomplete, there cannot be a part performance, any more than in cases unconnected with marriage (*o*).

Inconsistency of several agreements.

It has been held that where, in execution of an agreement for a settlement, two deeds inconsistent with each other were executed prior to the marriage, the mere fact that one of the two was later in date than the other did not necessarily entitle a party to claim certain privileges under the second which were in derogation of the trusts of the first (*p*). Nor is it a "usual clause" in ante-nuptial agreements for settlements in consideration of marriage to provide for the settlement of after-acquired property (*q*). And where such a covenant, without words of limitation, is entered into, it must be construed as if the usual words, "during the said intended coverture," had been inserted (*r*).

(*n*) *Cooper v. Wormald* (1859), 27 Beav. 266. See *Brown v. Jones* (1744), 1 Atk. 188; *Stone v. Stone* (1869), L. R., 5 Ch. 74.

(*o*) *Thynne v. Glengall* (1848), 2 H. L. C. 131; *Spurgeon v. Collier* (1758), 1 Ed. 54.

(*p*) *Gundry, In re, Mills v. Mills*, (1898) 2 Ch. 504.

(*q*) *Maddy's Estate, In re*, (1901) 2 Ch. 820.

(*r*) *Davenport v. Marshall*, (1902) 1 Ch. 85; *Edwards, In re* (1873), L. R., 9 Ch. 97. As to what is

It has been held that articles for a settlement entered into by a female infant in anticipation of marriage with a foreigner, whereby the settlor acquired a foreign domicile, are not irrevocably binding upon her if voidable by the law of the country in which she has acquired a domicile (*s*). It should further be noticed that an agreement for a settlement is both illegal and void if made in consideration of a marriage between parties who are prohibited from intermarrying either by statute law or by reason of consanguinity (*t*).

Ch. IX. s. 2.

SECTION III.

THE AGREEMENT BINDING ON ONE SIDE THOUGH NOT PERFORMED ON THE OTHER.

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There is this difference between agreements in consideration of marriage and all other agreements, namely, that where the agreement is in consideration of marriage, a breach of obligations by one party is not a sufficient excuse for non-performance by the other; and the reason is, that a contract in consideration of marriage is made not merely on behalf of the parties to the contract, but also on behalf of the issue that may spring from the marriage (*u*). The children are, in fact, regarded as purchasers (*x*).

Marriage agreements different from all others.

Rights of issue.

covered by the words "after-acquired," see *Coles v. Coles*, (1901) 1 Ch. 711.

(*s*) *Viditz v. O'Hagan*, (1900) 2 Ch. 87, C. A.

(*t*) *Neale v. Neale* (1899), 79 L. T. 629, C. A.; *Phillips v. Probyn*, (1899) 1 Ch. 811.

(*u*) It must be observed, however, that as against the defaulting

party, his non-performance would be a good defence. For, as Lord Redesdale says, in *Crofton v. Ormsby* (1806), 2 Sch. & Lef. 602, "Where the performance is sought by the defaulting party, he cannot enforce it against the person injured by his default."

(*x*) *Cole v. Buteman* (1711), 1 P. Wms. 141, 145; *Seale v. Seale*

Ch. IX. s. 3. Thus, in the case of *Harvey v. Ashley* (y), Lord Hardwicke, speaking of agreements in consideration of marriage, says:—

“These agreements differ from all others; for as soon as the marriage is had, the estate and capacities of the parties are altered. The children born of the marriage are equally purchasers, under both father and mother. Though either of the relations of the husband or of the wife should fail in the performance of their part, yet the children may compel a performance. If the wife's father hath agreed to give a portion, and the husband's father hath agreed to make a settlement, though the wife's father do not give the portion, yet the children may compel the settlement: for non-performance on one part shall be no impediment to the children receiving the full benefit of the settlement. So if there be a failure on the part of the husband's relations it is the same; for the children, considered as purchasers, are entitled to all the benefit of the uses under the settlement, notwithstanding there has been a failure on one side.”

In *Raneliffe v. Parkyns* (z), Lord Eldon said:—

“The consideration of marriage is not like the consideration in other contracts. In a contract between A. and B., if A. does not make it good on the one hand, B. is not bound on the other. But not so in the case of marriage; for if the mutual issue are purchasers, though it is not made good by one of the parties, the issue have a right to say, ‘You shall each of you do what you can do, and we must not be disappointed.’”

And in *Crofton v. Ormsby* (a), Lord Chancellor Redesdale thus expresses himself:—

“The failure in payment on the one part never vitiates a marriage settlement. If a woman, on her marriage, contracts for the settlement of her estate in a certain way by which the husband is to gain benefit, and he contracts to make a settlement, and she appears not to have the estate she contracted to settle, the object of that contract being to give a larger settlement to her, that might be a case in which the wife should not be allowed to have the benefit of the husband's contract. But that would not affect the children. They must have the estate. This has been over and over again decided in marriage contract cases.”

Again, in *Campbell v. Ingilby* (b), the Master of the Rolls said it was “utterly impossible to set aside a marriage contract

(1715), 1 P. Wms. 290; *Nairn v. Prowse* (1802), 6 Ves. 752; and see *Gundry, In re, supra*.

(y) (1748), 3 Atk. 607, 610.

(z) (1818), 6 Dow. 149, 209.

(a) (1806), 2 Sch. & Lef. 583, 602.

(b) (1856), 21 Beav. 567; 1 De

G. & J. 393. The propriety of the decision in this case was doubted in *Codrington v. Lindsay* (1875), L. R., 8 Ch. 578; *Ibid.* 7 H. L. 854. See *Feversham v. Watson* (1680), Finch, 445; *Perkins v. Thornton* (1740), Amb. 502.

as regards the children who may be born." And in a modern case (c), Lord Justice James stated that "if there was anything for the husband to do in which third persons were interested, the Court would take care that he obtained no benefit until he had performed his part of the agreement." Ch. IX. s. 3.

So strong is this rule, that, in a case where there were at least plausible grounds for maintaining that the covenants were intended to be dependent on each other, and where default was made on one side, the Court, nevertheless, gave effect to the claims of the children. This was the case of *Lloyd v. Lloyd (d)*, *Lloyd v. Lloyd*, where the husband's father covenanted that in case the marriage should be had, and in case the wife's father should, as soon as she came of age, settle his lands to the uses therein expressed, he (the husband's father) would settle *his* lands to his own use until the marriage, and from and after the marriage, to his own use for life, with remainder upon certain trusts for the benefit of the husband and wife, and issue of the marriage. The marriage was solemnized, and the wife came of age, but her father failed to settle the lands he had agreed to settle. Lord Cottenham held, nevertheless, that the husband's father was bound to perform the covenant on his part; his Lordship remarking, that— Remarks of Lord Cottenham.

"With respect to marriage contracts there could be no resistance on the part of one contracting party because another contracting party had failed to perform his part of the agreement; and the obvious reason was, that the parties to the contract were not the only persons having an interest in the subject; but the contract was made by them on behalf of the *issue of the marriage*."

Where it is really meant that the covenants shall be conditional, the terms employed must be distinct and unequivocal. For doubtless when the intention is plain, the Court will give effect to it. In the case last cited, Lord Cottenham said:—

"Unquestionably, however, even in the case of a marriage settlement the covenants may be so framed as to be mutually dependent; and if it be clear on the face of the settlement that such was the intention, that intention must prevail."

(c) *Jeston v. Key* (1871), L. R., 6 Ch. 610.

(d) (1837), 2 Myl. & Cr. 192.

Ch. IX. s. 3.

Thus, in *Pyke v. Pyke* (e), upon an ante-nuptial agreement by a husband to settle lands on his wife, it being stipulated that her fortune should remain in the hands of trustees till such settlement should be made, the husband dying insolvent without performing his covenant, the wife's fortune was held to have survived to her for her own benefit, and the issue were declared not entitled to claim it from her.

Who may
enforce mar-
riage con-
tracts.

It is a well-established rule that an incomplete contract or agreement will only be enforced at the suit of purchasers for valuable consideration. But in the case of marriage contracts, the consideration, which has always been held valuable, extends to the parties and the issue of the marriage (f); for the latter, although not strictly speaking *purchasers*, yet are presumed from the nature of the case to be in the contemplation of the parties when making the contract (g).

"They are said to be within the marriage consideration, that is to say, are so clearly within the objects of the settlement, that it would be wrong and injurious to the interest of society not to allow them to enforce it" (h). In the following passage, Lord Justice Cotton seems to confirm this view as to the position of the children:—

"As a rule, the Court will not enforce a contract, as distinguished from a trust, at the instance of persons not parties to the contract. (*Colyear v. Countess of Mulgrave* (i).) The Court would *probably* enforce a contract in a marriage settlement at the instance of the children of the marriage, but this is an exception from the general rule in favour of those who are specially the objects of the settlement" (k).

A further exception has been engrafted on the general rule in favour of the children of the intended wife by a former marriage (l), and also in favour of her illegitimate children (m); but

(e) (1749-50), 1 Ves. sen. 376.

(f) (1802), *Nairn v. Prowse*, 6 Ves. 752; Sug. V. & P. 716, 14th ed.

(g) (1877), *Gale v. Gale*, 6 Ch. D. 144.

(h) Per Fry, J., in *Gale v. Gale*, *ubi supra*, at p. 148.

(i) (1836), 2 Keen, 81.

(k) *Re D'Angibau* (1880), 15 Ch. D. 228, at p. 242.

(l) *Newstead v. Searles* (1737), 1 Atk. 265; *Chapman v. Emery* (1775), Cowp. 278; *Gale v. Gale*, *ubi supra*.

(m) *Clarke v. Wright* (1861), 6 H. & N. 849.

it seems that the same reasoning does not apply to the previous children of the husband (*n*). Ch. IX. s. 3.

The foregoing observations apply only to those cases where a covenant has to be enforced, or the aid of the Court invoked to carry out some incomplete settlement or agreement. If a settlement has been executed, or a complete voluntary assignment as distinguished from an executory agreement, or a complete voluntary trust as distinguished from a voluntary contract to create a trust, has been made, a volunteer as well as a purchaser is entitled actively to assert his equity (*o*).

Distinction between cases of executed and executory settlement or agreement.

The next of kin (*p*), collateral relatives (*q*), and children of a future marriage (*r*) have been held to be volunteers; but where the voluntary trust is executed, either by a completed settlement or declaration of trust, they become *cestuis que trust*, and the settlement, in accordance with the principle just stated, cannot be revoked (*s*).

The question also, Who can enforce a contract to create a trust? is very different from that which will be considered hereafter, namely, whether a limitation to collaterals in a marriage settlement of real estate is void as against a subsequent purchaser for value under the statute 27 Eliz. c. 4 (*t*).

If specific performance of marriage articles is decreed at the suit of a person within the consideration of the marriage, it will be decreed as to the articles in their entirety, so as to include limitations to collaterals (*u*).

(*n*) *Price v. Jenkins* (1876), 4 Ch. D. 483. Reversed on another ground, 5 Ch. D. 619. See, however, *Osgood v. Strobe* (1724), 2 P. Wms. 245; *Ithell v. Beane* (1748), 1 Ves. sen. 215.

(*o*) *Anstie, In re* (1886), 31 Ch. D. 596; and see *White & Tudor*, 7th ed. vol. ii., p. 835 *et seq.*

(*p*) *Heatley v. Thomas* (1809), 15 Ves. 596; *Savill v. Savill* (1846), 2 Coll. 721; *Paul v. Paul* (1881-2), 19 Ch. D. 47; 20 Ch. D. 742.

(*q*) *Johnson v. Legard* (1818), 3 Mad. 283; *Smith v. Cherrill* (1867),

L. R., 4 Eq. 390. See *Kekewich v. Manning* (1851), 1 D., M. & G. 176.

(*r*) *Wollaston v. Tribe* (1869), L. R., 9 Eq. 44. See, however, *Clayton v. Lord Wilton* (cir. 1800), 3 Mad. 302 (n.).

(*s*) *Paul v. Paul* (1880), *ubi supra*, overruling the same case, 15 Ch. D. 580.

(*t*) See *Re D'Angibau* (1880), 15 Ch. D. 228, 242.

(*u*) *Nash v. Goring* (1744), 3 Atk. 186, 190; *Davenport v. Bishopp* (1845), 1 Ph. 698. See also *Re D'Angibau, ubi supra*.

SECTION IV.

OF THE TERMS OF ANTE-NUPTIAL AGREEMENTS.

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*Randall v.
Morgan.*

Agreements in consideration of marriage, in order to be binding, must be positive and unqualified. Thus, in *Randall v. Morgan* (x), it appeared that previously to the marriage of Phillip Godfrey with Mary Crooke, her father wrote to him as follows:—

“You have already my sentiments in the letter I wrote you from St. Kitts; and nothing has arisen since that period to induce me to alter my opinion. The addition of 1,000*l.* 3 per cent. stocks is not sufficient to induce me to enter into a deed of settlement. Whether Mary remains single or marries, I shall allow her the interest of 2,000*l.*, at 4 per cent. If the latter, I may bind myself to do it, and pay the principal at my decease to her and her heirs.”

The marriage took place; and soon after it the father wrote a letter to his daughter, which contained the following passage:—

“Mr. Godfrey may draw immediately for 40*l.*, the half-year’s interest due on my bond for 2,000*l.*, which became due on the first of this month.”

The father had, in fact, promised to execute a bond for the 2,000*l.*, but it did not appear that he ever did execute it.

Sir William Grant disposed of the case in his usual brief and masterly way, simply saying,—

“The father professes indeed a resolution—a determination on which he means to act; but it is one which he keeps in his own power, the execution of which is to depend entirely upon himself. If the other construction should prevail, he would be making a settlement in the most disadvantageous way on his side, without stipulating for any settlement by the husband; though just before he had declared that the settlement offered by the husband was insufficient to induce him to make any settlement. This letter, therefore, is no agreement.”

(x) (1806), 12 Ves. 67. See also *Moorhouse v. Colvin* (1851), 15 Beav. 341.

The decision in this case is not, however, readily reconcilable with certain other decisions of the Court of Chancery, which seem to show that a parol promise before marriage, if subsequently supported by a post-nuptial statement in writing, or by some act on the part of the promisor virtually amounting to performance, is sufficient when coupled with the marriage to satisfy the Statute of Frauds, and enable the promisee to enforce the ante-nuptial parol undertaking (y).

In a case (z) before Lord Chancellor Sugden, the suitor of a young lady in Ireland communicated to her guardians a letter from his uncle, who stood *in loco parentis* to him, stating that he had by his will left one of his estates, which he mentioned, to his nephew. The guardians, however, resolved that, until a suitable settlement of real estate should be made by the uncle, the marriage should not take place. This resolution being reported to the uncle, he addressed his nephew in these terms:—

“MY DEAR ROBERT,

“My sentiments respecting you continue unalterable. However, I shall never settle any part of my property out of my power, so long as I exist. My will has been made for some time; and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made. Be assured that nothing could give me more pleasure than to hear of your union with the object of your fondest wishes; and I should be concerned that the resolution I have made should retard your happiness. However, I hope you will give me credit in believing that I am only actuated by the motive I have before mentioned, that of avoiding all jealousy that the rest of my family might feel had I complied with the wishes of the young lady’s guardians. I will thank you to communicate the subject of this letter in answer to one I have received from them. In all matters of this sort everything should be carried on in the most candid and explicit manner.”

(y) *Montacute v. Maxwell* (1733), 1 Strange, 235, at p. 237; *Chilliner v. Chilliner* (1754), 2 Ves. sen. 528; *Burkworth v. Young* (1856), 4 Drew. 1; *Surcombe v. Pinniger* (1853), 3

De G., M. & G. 571, Knight Bruce, at p. 573.

(z) *Maunsell v. White* (1854), 1 Jo. & Lat. 539; 4 H. L. C. 1039.

Ch. IX. s. 4.

Upon the strength of this assurance, such as it was, the marriage took place, but the uncle failed to make good the purpose which he in this qualified way expressed. Sir Edward Sugden held that the letter did not amount to an agreement; and that, even supposing it amounted to an agreement, the words "unless some unforeseen occurrence should take place" left it open to the writer to dispose of the property as he pleased (*a*).

Terms must
be definite;
but need not
be technical.

The agreement must also be consistent, intelligible (*b*), and definite (*c*).

It is not, however, necessary that the terms of an agreement in consideration of marriage should be such as a professional person would use in preparing a legal instrument. In *Luders v. Anstey* (*d*), words of mere "proposal" were held binding when immediately followed by marriage. And in *Saunders v. Cramer* (*e*), expressions which scarcely seem to import more than intention received a similar construction, having also been relied upon and acted upon. The case was as follows:—

Saunders v.
Cramer.

On the marriage of a young lady, her grandmother, who was not under any legal or moral obligation to provide for her, signed the following memorandum, which had been written by her agent at her request, viz.:—"Lady T. has desired C. (the agent) to notify that she intends leaving E. (the young lady in question) 2,000*l.*, to bear interest from her death, and to be secured by a bond. She has further desired C. to say that this is the provision she intends making for E. on her intended marriage." On the same day C. wrote to the intended husband, S., stating that Lady T. intended to give 2,000*l.* at her death, and a house at Cheltenham. Subsequently C. wrote to Lady T., stating that S. wished to have the bond perfected, and also to have the house which Lady T. intended to give. This letter was read to Lady T. by E., and she then desired E. to keep it, adding that it related to the business with S. The marriage was shortly afterwards solemnized in the lifetime of Lady T., who, however, died without having executed the bond, or conveyed the house. Lord Chancellor Sugden held that her representatives were bound (*f*).

(*a*) See also *Madox v. Nowlan* (1824), Beat. Ca. Ir. Cha. 632; and *Pickus, In re*, (1900) 1 Ch. 331.

(*b*) *Franks v. Martin* (1759), 1 Ed. 309.

(*c*) *Kay v. Crook* (1857), 3 Jur., N. S. 104. As to when two settle-

ments, mutually inconsistent, are executed, see *Gundry, In re*, (1898) 2 Ch. 504.

(*d*) (1799), 4 Ves. 501.

(*e*) (1842), 3 Dru. & War. 87.

(*f*) See also *Montgomery v. Reilly* (1827), 1 Dow & Cl. 62.

The circumstances under which a representation is made may convert into a binding contract what would otherwise be merely an expression of intention. Thus, in a modern case (*g*), a father on the marriage of his only child excused himself from making an immediate settlement upon her, on the ground that his capital was embarked in a large cotton business, and in a farm; and expressed an intention at the same time "in the event of the marriage taking place" of settling his property by will on his daughter "absolutely and independently of her husband, or, in other words, in strict settlement." It was held, that these expressions of intention amounted to a contract on the part of the father to settle the whole of the property of which he should die seised or possessed upon his daughter in strict settlement.

Ch. IX. s. 4.
Circumstances may constitute expression of intention a contract.

Bacon, V.-C., observed in the course of his judgment (*h*)—

"I must say, in my opinion, if any words can be said to express a clear meaning and intention—a positive undertaking and contract—these words are sufficient for that purpose, because these words are used at a time when a marriage is impending, a marriage to which the father has given his consent, which did take place shortly afterwards, and which, as cannot for a moment be disputed, did take place in consideration, among other things, of the promise which had been made by the father to settle his property in strict settlement upon the plaintiff and her children."

The decision, however, in this case can be equally well supported, on the general principle that where one person makes a representation to another, in consequence of which that other person contracts engagements, or alters his position, or is induced to do any other act which either is permitted by or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively (*i*).

If the representation and the marriage, or other engagement contracted by the person to whom such representation is made, do not form one transaction, no obligation which can be enforced is incurred by the person making the representation, which, in such a case, is merely *nudum pactum* (*k*).

(*g*) *Coverdale v. Eastwood* (1872), Eq. 131; see *Jordan v. Money* (1854), 5 H. L. C. 185, 210.

(*h*) Page 130.

(*k*) *Dashwood v. Jermyn* (1879),

(*i*) Per Bacon, V.-C., L. R., 15 12 Ch. D. 776.

SECTION V.

OF THE CONSTRUCTION OF ANTE-NUPTIAL AGREEMENTS.

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Importance of the marriage consideration.

Of all legal considerations marriage is the gravest, because it involves an irrevocable change of personal status. There can be no *restitutio in integrum*.

Agreements construed liberally.

Case of a bond extinguished at law.

It has been repeatedly said by the judges, that the consideration of marriage is not to be weighed in pecuniary scales (*l*). The construction, therefore, of agreements, in consideration of marriage, is large and liberal; not technical or refined. Of this a remarkable and early instance is furnished by the case of *Acton v. Peirce* (*m*) before Lord Keeper Wright. There the intended husband gave the intended wife a bond, conditioned to leave her 1,000*l*. if she should survive him. The marriage thereupon took place; what, then, became of the bond? At law it was void, because at law the marriage operated as a release and extinguishment of it. But the Lord Keeper held that it might, nevertheless, subsist as an agreement in equity, and he decreed accordingly. This precedent has always been followed (*n*).

(*l*) "There is a consideration, and the most valuable of all considerations, namely, the intended marriage." Per Lord Chancellor Sugden, in *Saunders v. Cramer* (1842), 3 Dru. & War. 87. See also *Prebble v. Boghurst* (1818), 1 Swan. 309, 318; *Campion v. Cotton* (1810-11), 17 Ves. 263, where the efficacy of the marriage consideration was

established in favour of a wife, although she knew of the husband's insolvency at the time, and the case was in other respects suspicious.

(*m*) (1704), 2 Vern. 480. There is an even earlier authority for this doctrine in the case of *Drake v. Storr* (1678), Freem. Ch. 255.

(*n*) "When a bond is executed in

In *Prebble v. Boghurst* (o), John Prebble, by a bond executed in contemplation of his marriage with Mary Townsend, bound himself, his heirs, executors, and administrators, to Hans Sloane and John Tilden, their executors, administrators, and assigns, in the penal sum of 2,000*l.*; the condition of the bond (upon which the whole question turned) being to the following effect:—

Ch. IX. s. 5.

Case of a bond not extinguished at law.

To be void, if John Prebble should at any time during his natural life become seised of any messuages, &c. in possession, and should settle the same upon the said Mary Townsend, and the issue of the said intended marriage, the better to make a provision for the said Mary Townsend in case she should happen to survive him.

This bond, not being to the intended wife, like that in *Acton v. Peirce*, was not released or extinguished by the marriage—which took place on the faith of it. During this marriage, John Prebble did not become seised of any real estate. He survived his wife and married again. During his second marriage he became seised of real estates amounting in value to 70,000*l.* At his death he left issue by both marriages. The question was, whether all those real estates were subject to the condition of the bond? A bill claiming the whole exclusively was filed by the children of the first marriage. The case being opened, Lord Eldon, recognizing the principle that a marriage bond was an agreement in equity, said:—

“This agreement having been distinctly entered into, and on the consideration of marriage, is such as, when its meaning is once ascertained, a Court of Equity will enforce. If there has been a breach of the bond at law, the plaintiffs are entitled to relief in equity. But they have no title in equity if there has been no breach at law. The principal question, therefore, is, whether the omission to settle the estates is a breach of the condition of the bond. On that question it will be proper to have the opinion of a Court of Law.”

A case was accordingly directed to the Court of Common Pleas, who certified that no breach had been committed. But

contemplation of marriage, there is no doubt that it constitutes an agreement which Courts of Equity will perform.” Per Lord Eldon, *Prebble v. Boghurst* (1818), 1 Swan. 318. See *Watkins v. Watkins* (1740), 2 Atk. 97; *Gage v. Acton* (1699), 1 Salk. 325. (o) (1818), 1 Swan. 309.

Ch. IX. s. 5. Lord Eldon was not satisfied; and he called for the aid of the Lord Chief Baron Richards and Mr. Justice Abbott (afterwards Lord Tenterden) to have the case solemnly considered in the Court of Chancery. Lord Eldon disclosed his own views to these learned judges in the following terms:—

“It strikes me that the argument in the Common Pleas did not unfold all the difficulties of the case. The bond, with this condition, was executed in contemplation of marriage, and there is no doubt that it constitutes an agreement which Courts of Equity will perform. It was not on that question that I desired the opinion of a Court of Law, nor of the judges who now assist me, but on this, whether there has been a breach of the condition of the bond—a question on which this Court is competent to declare an opinion, but which must be dealt with in the same way in equity as at law, and which, therefore, I took the liberty of sending to a Court of Law. The obligor on the marriage was to become entitled to 200*l.* absolutely, and also to a share of the personal estate of his wife's father after the death of her mother(*p*). What was his interest during the coverture in this part of the property does not appear; and it is unnecessary to state here what he could or could not have done with it. A part of the consideration, besides the pecuniary benefits, is marriage. I do not apprehend that the quantum of pecuniary benefit will affect the question, and I am surprised to find observations about the amount of the penalty as varying the reciprocity, when marriage is one of the considerations. An obligation to make a settlement on the wife and the issue will include an obligation to make a settlement on the issue after the death of the wife. The question for the opinion of the learned judges is whether the obligor on the death of the first wife, having married, and then, and not before, become seised of real estates, and having died without making a settlement of those estates in favour of the issue of the first marriage, has committed a breach of the condition?”

The two learned judges, after copious argument and mature deliberation, delivered their opinion in opposition to the certificate of the Court of Common Pleas. They held that a breach had been committed, so that in this discordance of high authorities Lord Eldon (as was his custom) adhered to his original impression. In finally disposing of the case, he observed:—

“Marriage bonds being considered in this Court as agreements, the case has been represented as a case of hardship, the issue of the first marriage claiming all the lands of which the obligor became seised during the second coverture as subject to the obligation, or, to give it another name,

(*p*) This appeared from the recitals in the bond.

the agreement. But unless hardship arise to a degree of inconvenience and absurdity that the Court can say such could not be the meaning of the parties, it cannot influence the decision. My opinion is that the bond affects all the lands of which the obligor was seised during his life. And I think that, the wife not having survived the husband, the conveyance must be made to the children of the first marriage, as tenants in common in fee" (q).

Ch. IX. s. 5.

Here, therefore, was a bond valid at law as well as in equity: and subject to the same construction in each jurisdiction. But how widely different the relief afforded! At law nothing could have been recovered beyond the penalty in the bond—2,000*l*. Whereas equity decreed the conveyance of estates valued at no less than 70,000*l*.; and this upon the great principle of specific performance, which gives, as Sir William Grant says (r), "*the very thing*" contracted for, instead of damages for a breach (s).

Difference of relief at law and in equity.

Or, in other words, an obligor entering into a bond with a penalty conditioned cannot elect to pay the penalty and avoid the bond, but must specifically perform the contract (t).

When agreements in consideration of marriage are meant to become the groundwork of settlements, they are called "marriage articles." They are often drawn up hastily, and signed on the eve of the nuptial ceremony from want of time to prepare a final deed; which, however, when ultimately executed, if it be in

Marriage articles.

(q) See on this subject *Rippon v. Dawding* (1769), 1 Ambl. 565; *Estcourt v. Estcourt* (1760), 1 Cox, 20; *Cannel v. Buckle* (1724), 2 P. Wms. 243; *Logan v. Wienholt* (1833), 1 Cl. & Fin. 611; 7 Bli. N. C. 1; *Chilliner v. Chilliner* (1754), 2 Ves. sen. 527; *Campion v. Cotton* (1810-11), 17 Ves. 263; *Douglas v. Wood* (1679), 1 Cha. Ca. 99; *Watson v. Routledge* (1777), Cowper, 705.

(r) *Bozen v. Farlow* (1816), 1 Mer. at p. 472.

(s) Actions of damages for breach of contract are, in some shape or other, common to the law of all civilized nations. But bills for specific performance seem peculiar

to the law of *this* country. It does not appear that anything of the kind was known to the civilians. Specific performance, therefore, is one of our very few indigenous plants. It has perhaps consequently been cultivated with more than ordinary assiduity; and under the care of a succession of great judges has become not only the most interesting, but, upon the whole, the most useful and important branch of equity jurisprudence. See the remarks of Lord Hardwicke, in *Penn v. Lord Baltimore* (1750), 1 Ves. sen. 446.

(t) *Logan v. Wienholt* (1833), 1 Cl. & Fin. 611.

Ch. IX. s. 5. strict conformity with the articles, will supersede them. When the deed is not in harmony with the articles, the Court, as we shall see hereafter, will reform it, so as to make it conformable to the agreement of the parties.

SECTION VI.

ANTE-NUPTIAL AGREEMENTS BY INFANTS (u).

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Where both parties are minors.

Where both parties are minors, it would seem that no agree-

(u) "Miserable must the condition of minors be, excluded from the society and converse of the world, deprived of necessities, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others if they were bound by no act. The law, therefore, at the

same time that it protects their imbecility and indiscretion from injury through their imprudence, enables them to do binding acts for their own benefit, and without prejudice to themselves, for the benefit of others. To mention a rule or two,—If an infant does a right act, which he ought to do,

ment in consideration of marriage can bind them (x). It was formerly thought that the concurrence of guardians might render binding the acts of infants (y). But this is no longer law (z). And before the Infants Settlement Act, 1855 (a), even the

Ch. IX. s. 6.
Concurrence
of guardians.
Sanction of
the Court.

which he was compellable to do, it shall bind him; as if he makes equal partition, if he pays rent, if he admit a copyholder upon a surrender. A right and lawful act is not within the reason of the privilege which is given to protect infants from wrong. His being compellable to do it proves the act to be substantially what he ought to do. To what end should the law permit a minor to avoid an act which he might be compelled to do over again after it was undone? This would be assisting him to vex and injure others, without the least benefit to himself. Another rule is, 'that the acts of an infant which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding'; as when an infant patron presents; when an infant executor duly receives, and acquits, pays and administers the assets; when an infant head of a corporation joins in corporate acts; or when an infant officer does the duties of an office which he may hold. A third rule, deducible from the nature of the privilege (which is given as a *shield*, and not as a *sword*), is, 'that it shall never be turned into an offensive weapon of fraud or injustice'; as where a tenant for life and an infant in remainder levied a fine; the infant reversed the fine as to himself for the inheritance for nonage, yet he was bound by his assent to the fine and joining in it not to enter for the forfeiture."—Per Lord Mansfield, in *Zouch v. Parsons* (1765), 3

Burr. 1794; 1 Black. Rep. 575. See now as to infants, 37 & 38 Vict. c. 62, the Infants' Relief Act, 1874. See also 44 & 45 Vict. c. 41, ss. 41—43, Conveyancing, and 45 & 46 Vict. c. 38, ss. 59, 60, Settled Land.

(x) "Where the intended husband and wife are both under full age, no binding settlement of their respective property can be made": Bythewood & Jarman, Conveyancing, vol. 6, p. 144 (ed. 1890); and see *Seaton v. Seaton* (1888), 13 App. Cas. 61; *Leigh, In re* (1888), 40 Ch. D. 290. But repudiation must be within a reasonable time after attaining majority: *Carter v. Silber*, (1892) Ch. D. 278, C.A.; *Jones, In re, Farrington v. Forrester*, (1893) 2 Ch. D. 461. Where, however, the marriage of a woman with an alien, by altering her domicile, renders her amenable to the law of her husband's country, the rule requiring repudiation within a reasonable time does not necessarily apply: *Viditz v. O'Hagan*, (1900) 2 Ch. 87, C. A.

(y) See *Harvey v. Ashley* (1748), 3 Atk. 607; *Ainslie v. Medlycott* (1803), 9 Ves. 13, 19.

(z) Per Lord Thurlow: "I cannot conceive that the parents' or guardians' consent can make any essential difference in the contract": *Durnford v. Lane* (1781), 1 Bro. C. C. 106, p. 111. See *Simson v. Jones* (1831), 2 R. & M. 365; *Field v. Moore* (1855), 7 De G., M. & G. 691.

(a) 18 & 19 Vict. c. 43: "An Act to enable infants, with the

Ch. IX. s. 6. sanction of the Court of Chancery could not cure their disability (*b*). Now, however, this Act, as extended by 23 & 24 Vict. c. 83, renders valid not only an ante-nuptial but also a post-nuptial settlement of an infant's estate, if made with the approval of the Court of Chancery (*c*).

Infant on one side and adult on the other.

Case of female infant: her chattels personal in possession.

It has, however, been held that, even with such approval, an infant cannot exercise a power over personal property (though authorized to do so by the instrument creating the power) which goes to defeat his or her own interest therein (*d*). But where the contract was between an infant on the one side and an adult on the other, the adult might have been bound, although the infant was not. Thus, to put the simplest case, let us suppose that before the marriage of a female infant and a male adult, certain articles were entered into, whereby it was agreed to settle the wife's chattels personal in possession. These, as we have seen (*e*), would formerly, but for the agreement, have passed to the husband as his absolute property by virtue of the marriage. The agreement, therefore, to settle them was considered to be, not the agreement of the wife, but that of the husband, and he alone required to be bound.

Alteration by Act of 1882.

These latter considerations no longer apply where the marriage took place on or after the 1st January, 1883; for, by virtue of the Married Women's Property Act, 1882, which came into operation on that day, the wife retains all her real and

approbation of the Court of Chancery, to make binding settlements of their real and personal estate on marriage." For certain decisions under this Act, see *Johnson, In re*, (1891) 3 Ch. 48; and *Scott, In re*, (1891) 1 Ch. 298.

(*b*) *Simson v. Jones and Field v. Moore*, *ubi supra*. Compare *Earl of Buckinghamshire v. Drury* (1761), 2 Ed. 60. Where, however, a ward is married without the approbation of the Court, not only will the husband be compelled to make a proper settlement, but the Court will tie up the property of the ward. This jurisdiction, by the exercise of

which the capital is sequestered in favour of unborn children, and the owner is deprived of the power of giving even a life interest to her husband, is pronounced by Mr. Hayes to be "arbitrary, unjust and impolitic": *Conveyancing*, vol. 1, p. 560, 5th ed. And see *Bathurst v. Murray* (1802), R. R. 230; *Field v. Brown* (1853), 17 Beav. 146.

(*c*) *Sampson and Wall, In re* (1884), 25 Ch. D. 482, C. A.; *Philips, In re* (1887), 34 Ch. D. 467.

(*d*) *Armil's Trusts, In re* (1871), Ir. R., 5 Eq. 352.

(*e*) *Ante*, p. 19.

personal property, and the husband takes no interest therein during the coverture. Accordingly, the adult husband has no more power to bind the property of his infant wife than the adult wife formerly had to bind that of her infant husband.

Ch. IX. s. 6.
Husband no power to bind infant wife's property.

It has, however, been held, in the modern case of *Buckland v. Buckland* (f), that upon the true construction of the Married Women's Property Act, 1882, sect. 19 prevents sect. 2 of that Act from interfering with any settlement which would have bound the property if the Act had not been passed.

Buckland v. Buckland.

Consequently, where an agreement has been effected between the husband and the trustees, such agreement is so far operative between the parties to it as to disentitle the wife, although such agreement is not binding upon her, to have the trust funds transferred to her as her separate estate.

In the former editions of this work, the subject of ante-nuptial agreements by infants received a very full discussion (g). Its importance, however, is now considerably diminished; and, accordingly, only an outline of the former law is now offered to the reader.

The infant wife's chattels personal in possession were, as we have seen, absolutely bound by the husband's settlement, and the doctrine has been extended to her chattels real, so as to exclude her right by survivorship (h). But, somewhat inconsistently, her right to her choses in action by survivorship was held not to be excluded by such a settlement, where they had not been reduced into possession during the coverture (i).

Formerly wife's chattels bound,

but not choses in action if not reduced into possession.

And where the property consisted of real estate, the agreement bound neither the wife nor her heirs (k). The settlement, however, was binding on the adult husband, who, accordingly,

Real estate.

Adult husband bound.

(f) (1900) 2 Ch. 534.

(g) See 1st ed. 247—257; 2nd ed. 253—266.

(h) *Trollope v. Linton* (1823), 1 Sim. & St. 477.

(i) *Ellison v. Elwin* (1843), 13 Sim. 309; *Le Vasseur v. Scrutton* (1844), 14 Sim. 116; *Cunningham v. Antrobus* (1848), 16 Sim. 436; *Borton v. Borton* (1849), *ibid.* 552;

Rawlins v. Birkett (1856), 25 L. J., Ch. 837.

(k) *Pearson v. Pearson and May v. Hook*, cited in *Durnford v. Lane* (1781), 1 Bro. C. C. 113, n.; *Clough v. Clough* (1787), 3 Wooddes. 453, n.; *Milner v. Lord Harewood* (1810), 18 Ves. 259, 275; *Pimm v. Insall* (1848), 7 Hare, 193; 1 M. & G. 449.

Ch. IX. s. 6. was not allowed to aid the wife in any attempt to defeat the uses of the articles (*l*).

Covenant to settle after-acquired property.

A *covenant* on the part of the husband to settle the after-acquired property of the wife bound him, so far as he was able, to carry it into effect, but did not compel him "to cajole or coerce his wife into conveying her separate property to the uses of the settlement" (*m*). And an *agreement* by the husband and wife, in an ante-nuptial settlement, for the settlement of the wife's after-acquired property, has been held to be a covenant by the wife as well as by the husband, whether the wife is a minor or of full age (*n*); and where a married woman, after attaining her majority, by deed, though unacknowledged, affirms a settlement executed by her before her marriage, whilst an infant, such settlement is binding on her (*o*). Moreover, as already stated, repudiation of an agreement, voidable but not void on the ground of infancy, must be within a reasonable time (*p*); but where the agreement was so expressed as to relate only to acts to be done by the husband, it was decided that the wife was not bound to bring into settlement property given to her separate use (*q*). The Court has, however, no jurisdiction to compel an infant ward to make a settlement of his own property because he has been guilty of contempt in marrying without leave (*r*).

The provision as to settling after-acquired property has in

(*l*) *Durnford v. Lane* (1781), 1 Bro. C. C. 106; *Exp. Blake* (1853), 16 Beav. 463.

(*m*) Per Jessel, M. R., in *Dawes v. Tredwell* (1881), 18 Ch. D. 354, 360. See also *Re Waring* (1852), 21 L. J., Ch. 784; *Ramsden v. Smith* (1854), 2 Drew. 298.

(*n*) *Smith v. Lucas* (1881), 18 Ch. D. 531. This covenant by the infant wife is of course voidable, and is binding upon her only by virtue of the doctrine of election; and as to the question whether this subject is affected by the Infants' Relief Act, 1874, see *post*, p. 270.

(*o*) *Hodson, In re*, (1894) 2 Ch.

421.

(*p*) *Edwards v. Carter*, (1893) A. C. 360.

(*q*) *Dawes v. Tredwell* (1881), 18 Ch. D. 354. See also *Re Waring* (1852), 21 L. J., Ch. 784. When the intended wife is adult, her covenant includes property subsequently given to her "for her separate use independently of any husband": *Re Allnutt* (1883), 22 Ch. D. 275, not following *Re Mainwaring's Settlement* (1866), L. R., 2 Eq. 487. And see *Scholfield v. Spooner* (1884), 26 Ch. D. 94.

(*r*) *Leigh, In re* (1888), 40 Ch. D. 290, C. A.

recent times generally assumed the form of an agreement by all parties: and such an agreement operates as a covenant by each party in respect of the acts to be done by him or her. The agreement is, in fact, read distributively, and not so as to impose obligations where there is no power of fulfilling them. Thus, in *Dawes v. Tredwell* (s), the husband was decided not to have incurred any obligation in respect of the after-acquired separate property of his wife; and this decision governs all acquisitions of property which fall within the provisions of the recent Act. Ch. IX. s. 6.

In cases where the property of the infant wife was not originally bound by the settlement, she might have confirmed it after the death of her husband if of full age (t). And she might, after attaining twenty-one, and during the coverture, have elected whether the covenant should be binding on her separate estate or not; but in so electing she bound only that separate property to which she was entitled at the date of the confirmation, and not that to which she might subsequently become entitled during the coverture (u). Confirmation.

Where, however, an infant, with the sanction of the Court, enters into a covenant to settle after-acquired property (in consideration of marriage), such covenant will apparently apply to, and bring within the settlement, an interest acquired by the settlor under the will of a person who dies after the execution of the deed (x). Under modern law.

In a recent case (y) this rule has, however, been held not to

(s) (1881), 18 Ch. D. 354.

(t) *Ashton v. M'Dougall* (1842), 5 Beav. 56; *Davies v. Davies* (1870), L. R., 9 Eq. 468. As to what amounts to a confirmation of the settlement, see *White v. Cox* (1876), 2 Ch. D. 387.

(u) *Smith v. Lucas* (1881), 18 Ch. D. 531. See also *Wilder v. Pigott* (1883), 22 Ch. D. 263, where it seems to have been decided that the wife could elect during her coverture to confirm the settlement so as to bind a contingent reversionary interest in personalty not

given to her separate use, a proposition which must be accepted with some reserve; since the learned judge who decided the case professed to follow *Smith v. Lucas*, where the distinction is clearly maintained between a confirmation of the settlement generally, and a confirmation as regards particular property.

(x) *Johnson, In re*, (1891) 3 Ch. 48.

(y) *Ellenborough, In re*, (1903) 1 Ch. 697.

Ch. IX. s. 6. apply to a *voluntary* settlement of an expectancy or *spes successionis*, which cannot therefore be enforced against the settlor.

Election.

The settlement of an infant's property may also become binding on her upon the principle of election, whereby if she accepts benefits under the settlement she cannot withdraw her own property from its operation (z). The principle of "election" is thus defined by Lord Cairns: "By the well-settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our Courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them" (a). But as, prior to the Act of 1882, a married woman had no power to contract except in respect of her separate property in existence at the date of such contract (b), a married woman could not elect so as to bind her after-acquired separate property (c), or property in respect of which she was restrained from anticipation (d).

The next of kin (e) and the heir-at-law (f) of the wife are, equally with the wife herself, bound to elect whether they will take under or against the settlement.

In a case where the wife had become of unsound mind, it was held that the Court would, when it appeared to be for her benefit, make an election on her behalf (g).

**Female infant
may contract**

A female infant who has no property of her own to settle

(z) *Barrow v. Burrow* (1858), 4 K. & J. 409; *Willoughby v. Middleton* (1862), 2 J. & H. 344; *Brown v. Brown* (1866), L. R., 2 Eq. 481.

(a) *Codrington v. Codrington* (1875), L. R., 7 H. L. 854, at p. 861.

(b) *Pike v. Fitzgibbon* (1880), 17 Ch. D. 454.

(c) *Smith v. Lucas* (1881), 18 Ch. D. 531.

(d) *Ibid.*; *Willoughby v. Middleton*, *ubi supra*, being questioned on

this point. See also the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 39, under which the Court has power to remove the restraint on anticipation if it be for the benefit of a married woman.

(e) *Savill v. Savill* (1846), 2 Coll. 721.

(f) *Brown v. Brown* (1866), L. R., 2 Eq. 481.

(g) *Wilder v. Pigott* (1882), 22 Ch. D. 262.

may contract for the preparation of a settlement, which is in such a case considered a necessary: and is liable to pay for the costs of it; but it seems doubtful whether its provisions would bind her (*h*). Ch. IX. s. 6.
for preparation of settlement.

A female infant may be barred of dower by a jointure made by a settlement before marriage (*i*); but such provision for her must not be precarious (*k*). The old law, however, on this point has become unimportant since the 3 & 4 Will. 4, c. 105, by which women (including infants) married after the 1st January, 1834, may be barred of dower, as mentioned in the Act. Infant may accept jointure in bar of dower.

Prior to the Infants Settlement Act, 1855, where the intended husband was an infant, he was entirely disabled from entering into any valid contract for the settlement of his property (*l*), and his wife, taking no interest in such property during the coverture, was of course unable to bind him by her contract. The infant husband, however, is competent to assent to a settlement by the wife of her real estate, so as to exclude any imputation of fraud on his marital right (*m*); and in such a case he was bound to give effect to the settlement, not because he had contracted to do so, but because his marital right was effectually excluded by the ante-nuptial settlement. Infant husband not bound by settlement.

In *Nelson v. Stocker* (*n*), a male infant, previously to his marriage with a woman possessed of personal property, executed a settlement by which he covenanted to pay 1,000*l.* to the trustee; subsequently he received the wife's personal estate, and after her death refused to pay the 1,000*l.*: it was held by the Lords Justices (Knight Bruce and Turner), reversing the decision of the Court below, that as the wife was not deceived by his misrepresentations as to his age, the settlement was not binding upon him. Nelson v. Stocker.

A male infant, however, might as well as a female have been Husband may be put to his election.

(*h*) *Helps v. Clayton* (1864), 17 C. B., N. S. 553.

(*i*) *Drury v. Drury* (1761), 2 Ed. 38.

(*k*) *Caruthers v. Caruthers* (1793), 4 Bro. C. C. 500; and see *Corbet v. Corbet* (1828), 1 S. & S. 612; S. C., 5 Russ. 254.

(*l*) *Honywood v. Honywood* (1855), 20 Beav. 451; *Derbishire v. Home* (1852), 5 De G. & Sm. 702; 3 D., M. & G. 80.

(*m*) *Slocombe v. Glubb* (1789), 2 Bro. C. C. 545.

(*n*) (1859), 4 De G. & J. 458.

Ch. IX. s. 6. put to his election between benefits conferred upon him by the settlement, and the disposition thereby made of his own property; and if the election had to be made during infancy, the Court decided for the infant what election ought to be made (*o*). The Court generally directed an inquiry as to what would be most for the infant's benefit (*p*); but in a clear case the election might be declared without a reference (*q*).

Infants'
Relief Act,
1874.

An infant's contract was formerly voidable and not void, and was capable of effectual ratification under Lord Tenterden's Act (*r*), after the infant attained the age of twenty-one, by writing under his hand. But by the Infants' Relief Act, 1874 (*s*), which has been held to be retrospective (*t*), it is enacted that—

“No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age” (*u*).

This enactment supersedes the corresponding section of Lord Tenterden's Act; and if the words “any promise or contract” are taken in their widest sense, and are not restricted by what may be conceived to be the object of the statute, it seems to render a valid ratification of an infant's settlement impossible (*x*); for, although a ratification when of full age would probably be equivalent to the execution of a new instrument, yet it would derive from the invalid ante-nuptial settlement no valuable consideration, and would accordingly be void as against subsequent purchasers for value.

Previously to the passing of the 18 & 19 Vict. c. 43, the

(*o*) *Simson v. Jones* (1831), 2 R. & M. 365, 374.

(*p*) *Brown v. Brown* (1866), L. R., 2 Eq. 481; *Bennett v. Holdsworth* (1877), 6 Ch. D. 671.

(*q*) *Blunt v. Lack* (1857), 26 L. J., Ch. 148; *Lamb v. Lamb* (1857), 5 W. R. 720, 772; and see *Wilson v. Townshend* (1795), 2 Ves. jun. 693.

(*r*) 9 Geo. 4, c. 14, s. 5.

(*s*) 37 & 38 Vict. c. 62.

(*t*) *Exp. Kibble* (1875), L. R., 10 Ch. 373.

(*u*) For the far-reaching effect of this section, see *Foulkes, In re, Foulkes v. Hughes* (1893), 69 L. T. 183.

(*x*) See *Trowell v. Shenton* (1878), 8 Ch. D. 318.

Court declined to sanction the marriage of an infant ward, as he could not by reason of infancy make a binding settlement of his real estate (*y*). Ch. IX. s. 6.

If the infant is a ward of Court the sanction of the Court must be obtained to the marriage, and such sanction will not be granted unless it appears both that the marriage is suitable and that the proposed settlement is proper (*z*). Settlements where infants are wards of Court.

Where the ward married immediately after attaining twenty-one, and the fund in Court was small, it was directed to be paid out to her and was not settled (*a*).

Where a female ward marries without the sanction of the Court the husband is excluded from all interest under the settlement (*b*).

The powers of the Court over the property of the ward will continue after she has attained twenty-one (*c*).

By the Infants Settlement Act, 18 & 19 Vict. c. 43 (extended to Ireland by the 23 & 24 Vict. c. 83), it has been enacted that from and after the passing of the Act, viz., 2nd July, 1855 (sect. 1)— Operation of 18 & 19 Vict. c. 43.

“It shall be lawful for every infant in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property or property over which he or she has any power of appointment whether real or personal, and whether in possession, reversion, remainder or expectancy (*d*); and every conveyance, appointment and assignment of such real or personal estate, or contract to make a conveyance, appointment or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to

(*y*) *Honywood v. Honywood* (1855), 20 Beav. 451.

(*z*) Simpson on Infants, 314; Seton, 6th ed., 1059 *et seq.* For mode of application and proceedings thereon, see Dan. Ch. Pr., 7th ed., vol. 1, pp. 927—931.

(*a*) *White v. Herrick* (1869), L. R., 4 Ch. 345; and see *Leigh v. Leigh* (1888), 40 Ch. D. 290, C. A.

(*b*) *Kent v. Burgess* (1840), 11 Sim. 361; *Wade v. Hopkinson* (1854-5), 19 Beav. 613.

(*c*) *Cave v. Cave* (1852), 15 Beav.

227. As to the binding effect, on a ward after she had attained twenty-one, and, on her husband of an order to settle her real estate, see *Blackie v. Clark* (1852), 15 Beav. 595; and for further observations on the subject of wards of Court and their settlements, see notes to *Eyre v. Countess of Shaftesbury*, Wh. & Tu. L. C., 7th ed., vol. 1, pp. 499 *et seq.*, and Seton, 6th ed., pp. 1049 *et seq.*

(*d*) As to what is comprised in the term “expectancy,” see *Johnson, In re*, (1891) 3 Ch. 48.

Ch. IX. s. 6. — such settlement shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be executed by an infant."

By sect. 2 it is provided—

"That in case any appointment under a power of appointment or any disentailing assurance shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void."

It should be noted that this section applies exclusively to infant tenants in tail. Consequently, in other cases, the death of an infant under twenty-one, after making an appointment under sect. 1, does not render such appointment void (*e*).

By sect. 3 it is provided that—

"The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given upon petition presented by the infant or his or her guardian in a summary way without the institution of a suit: and if there be no guardian the Court may require a guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition."

And by sect. 4 it is provided—

"That nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years" (*f*).

It has been decided that a petition under this Act does not constitute the applicant a ward of Court, and that therefore the only duty imposed on the Court is to look to the propriety of the proposed settlement, but not to inquire as to the fitness of the intended marriage, although the former inquiry might sometimes involve the latter (*g*).

(*e*) *Scott, In re*, (1891) 1 Ch. 298. *De Stacpoole* (1887), 37 Ch. D. 139.

(*f*) As to provision for payment of costs of settlement of property of a ward of Court, see *De Stacpoole v.* (1857), 26 L. J., Ch. 64.
(*g*) *In re Dalton* (1856), 6 De G., M. & G. 201; but see *Re Strong* (1857), 26 L. J., Ch. 64.

By Rules of the Supreme Court, Ord. LV. r. 26, evidence Ch. IX. s. 6.
must be produced to show (1) the age of the infant; Evidence
(2) whether the infant has any parents or guardians; (3) with required.
whom, or under whose care, the infant is living, and, if the
infant has no parents or guardians, what near relations the infant
has; (4) the rank and position in life of the infant and
parents; (5) what the infant's property and fortune consist of;
(6) the age, rank and position in life of the person to whom the
infant is about to be married; (7) what property, fortune and
income such person has; (8) the fitness of the proposed trustees,
and their consent to act (h).

It has been held that the Court may under this Act sanction Post-nuptial
a post-nuptial settlement of a ward made with its approval (i); settlement
but if the infant is not a ward of Court, there is no such may be
power (k). Where an infant, for whom an order for main- sanctioned.
tenance had been made, married without a settlement, the Court
varied a post-nuptial settlement, so as to insert a covenant to
settle her future property in accordance with a previous draft
settlement (l).

(h) Seton, vol. 2, p. 1062.

(i) *Powell v. Oakley* (1865), 34
Beav. 575; *Re Wall* (1884), 25 Ch.
D. 482. But see *Seaton v. Seaton*
(1888), 13 App. Cas. 61.

(k) See also *Wortham v. Pember-*
ton (1847), 1 De G. & Sm. 644; *Re*
Potter (1869), L. R., 7 Eq. 484.

(l) *Re Hoare's Trusts* (1862), 11
W. R. 181; and see *Re Hodge's*
Settlement (1857), 3 K. & J. 213,
where it was decided on a petition
under this Act that an order for
maintenance constituted a young
lady a ward of Court.

CHAPTER X.

MARRIAGE SETTLEMENTS.

SECTION I.

SETTLEMENTS IN PURSUANCE OF ANTE-NUPTIAL ARTICLES.

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Conformity of settlement to articles.

WHERE the marriage has taken place on the faith of ante-nuptial articles, the parties have a right to insist on the execution of such articles by a proper deed of settlement; and for this purpose a Court of Equity will, if necessary, lend its assistance to compel specific performance (*a*). The deed ought, of course, to carry out the intention of the articles, however inartificially they may have been framed (*b*); and where the articles would, if literally followed, give to the husband an estate tail, equity

(*a*) *Grier v. Grier* (1870), L. R., 5 H. L. 688, 706.

(*b*) *Sackville-West v. Holmesdale* (1872), L. R., 4 H. L. 543.

will carry them into effect by limitations in strict settlement. *Chap. X. s. 1.*
 The general principles governing the remodelling of settle- *Remodelling*
 ments, so as to effectuate the original intention of the parties, *of settle-*
 have been recently discussed in the case of *Fitzgerald v. Fitz-*
gerald (c), in which it was held that where the deed itself affords
 sufficient evidence of the intention of the parties to enable the
 Court to rectify the mistake and to reform the settlement in
 accordance with such intention, rectification will be decreed
 almost as a matter of course. For, as Lord Chancellor Maccles-
 field said in *Trevor v. Trevor (d)*, "Articles are only minutes or
 heads of the agreement of the parties, and ought to be modelled
 when they come to be carried into execution, *so as to make them*
effectual." The husband, Sir John Trevor, by the terms of the
 articles, would have had an estate tail which he could immediately
 bar. Therefore his Lordship held that the intention evidently
 was only to give him an estate for life; "otherwise the settle-
 ment would be vain and ineffectual; and if a settlement were
 made defective in any particular, it would not be final or con-
 clusive, and a second settlement must be made till the uses were
 well and duly raised" *(e)*.

According to the report of this case in Peere Williams *(f)*,
 Lord Macclesfield said: "That marriage articles were in their
 nature executory, and ought to be construed and moulded in
 equity according to the intention of the parties. Now that
 intention was plain. . . . And it would be a strange and
 vain construction of the articles if Sir John should have such an

(c) (1902) 1 Ir. R. 477, C. A.

(d) (1720), 1 Eq. Ca. Abr. 387,
 pl. 7. See Journals of House of
 Lords, vol. 21, p. 221, where the
 judgment affirming Lord Maccles-
 field's decree is set out.

(e) See also *Welman v. Welman*
 (1880), 15 Ch. D. 570.

(f) (1720), vol. I., p. 631. The
 earliest case on the point is that
 of *Jones v. Laughton*, in 1698, 1
 Eq. Ca. Abr. 392, pl. 2, which was
 as follows:—Upon a marriage,

articles were entered into, whereby
 it was agreed that the wife's portion
 should be laid out in the purchasing
 of lands, which should be settled on
 the husband and wife for their lives
 and the life of the longest liver of
 them, and after to the heirs of the
 body of the wife by the husband to
 be begotten; yet the Master of the
 Rolls, Sir John Trevor, decreed the
 settlement to be to the first and
 other sons, &c., so as the husband
 and wife might not have power to
 bar the issue.

Chap. X. s. 1. estate by them, the limitations of which the very next day he might by a fine destroy." There would, in such a case, be no settlement at all.

By marriage articles, which recited that the intended husband had received a sum of 600*l.* from his intended wife, a jointure of 60*l.* a year was provided for her, charged upon the husband's land, with the ordinary powers of distress and entry; and it was thereby agreed that the intended husband should settle all the residue and remainder of the said land *upon his issue* by the intended wife after the payment of the said sum of 60*l.* a year. On the construction of these articles, it was decided (*g*) that effect should be given to the word "issue," by giving estates tail to the children of the marriage, the sons taking successively, and the daughters together; and also that there was no power to charge the lands with portions in favour of younger children.

General rule. The general rule as to reforming settlements framed upon ante-nuptial articles is thus laid down by Lord Chancellor Talbot (*h*): "Where articles are entered into before marriage, and settlement made after marriage, different from the articles, this Court will set up the articles against the settlement." That is to say, the Court will order the settlement to be reformed. And for this purpose no other evidence is necessary (*i*).

It has, moreover, been held in some cases that parol evidence of the intention of the parties is admissible.

Corroboration under such circumstances is, however, usually necessary (*k*).

Where both articles and settlement are ante-nuptial.

Where both the articles and the settlement are prior to the marriage, any discrepancy between them will in general be presumed to have arisen from some change of mutual intention while matters remained open; and, consequently, in such a case the settlement will stand. For, as Lord Chancellor Talbot said in *Legg v. Goldwire* (*h*): "Where both articles and

(*g*) *Grier v. Grier* (1870), L. R., 5 H. L. 688.

(*h*) *Legg v. Goldwire* (1733), Cas. temp. Talb. Forr. 20. See also *Streatfield v. Streatfield* (1735), *ibid.* 176; *Lambert v. Peyton* (1860), 8 H. L. Cas. 1; *Roberts v. Kingsley* (1749), 1 Ves. sen. 238. For further

cases, see notes to *Lord Glenorchy v. Bosville*, Wh. & Tud. L. C., 7th ed., vol. 2, pp. 770—802.

(*i*) *Cogan v. Duffield* (1876), 2 Ch. D. 44; and see *Viditz v. O'Hagan*, (1899) 2 Ch. 569.

(*k*) *Bonhote v. Henderson*, (1895) 1 Ch. 742.

settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles." Articles are considered in a Court of Equity as minutes only which the settlement may explain more at large (*l*). But if the settlement expressly declares that it is made *in terms of the articles*, and yet in fact differs from them, in such a case the settlement will be reformed and made to correspond with the articles (*m*). A very remarkable instance of equitable interposition for this purpose occurred in the well-known case of *West v. Errissey* (*n*), where a settlement copying the very words of the articles was reformed, although both the articles and the settlement were made before the marriage. Upon this case, however, Lord Chancellor Talbot remarked (*o*): "Although in the case of *West v. Errissey*, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule; for in that case the settlement was expressly mentioned to be made in pursuance and performance of the said marriage articles, whereby the intent appeared to be still the same as it was at the making the articles." When the articles and indenture of settlement bear date on the same day, they must be considered as one and the same act, and a different construction ought not to be put upon them (*p*).

The Court will not rectify a settlement on the ground of a mistake, unless the evidence, both as to the mistake and as to the real intention of the parties, be perfectly clear and satisfactory (*q*). Thus where a post-nuptial settlement recited an ante-nuptial agreement, which was not forthcoming, the Court refused to rectify the settlement in accordance with the recital;

Evidence of mistake must be clear.

(*l*) *Blandford v. Marlborough* (1743), 2 Atk. 542.

(*m*) *Bold v. Hutchinson* (1855), 25 L. J., Ch. 598.

(*n*) (1726), 2 P. Wms. 349; 1 Bro. P. C. 225; and see *Honor v. Honor* (1710), 1 P. Wms. 123. See also Peachey on Settlements, p. 134 *et seq.*

(*o*) Cas. temp. Talb. Forr. 20. See also remarks of Lord Chancellor Loughborough, in *Randall v. Willis* (1800), 5 Ves. p. 275.

(*p*) *Heneage v. Hunloke* (1742), 2 Atk. 456.

(*q*) *Tucker v. Bennett* (1887), 38 Ch. D. 1, C. A.

Chap. X. s. 1. the presumption being rather that the articles had been inaccurately recited than that the settlement, which had been acted on for a long time, was incorrect (*r*). In an earlier case (*s*), on the occasion of an intended marriage between the only son of an English marquis and the daughter of a Scotch earl, the terms of settlement were incorporated in "proposals" which were approved of by the respective fathers on behalf of their children. The "proposals," after sundry other stipulations, concluded with a proviso that the settlement should contain "all usual and necessary clauses." A settlement was accordingly prepared in London, of which the general provisions were in conformity with the terms of the proposals. And the marriage took place. Many years afterwards the Scotch earl died, leaving a large personal estate, out of which his daughter, unless barred by the settlement, would have been entitled to claim *legitim* (*t*). A bill was filed against the husband and wife, alleging that, according to Scotch law, a clause barring this *legitim* was "a usual and necessary clause" within the meaning of the "proposals," and should therefore have been introduced into the settlement, which, inasmuch as it contained no such clause, ought to be reformed. The bill prayed a declaration accordingly. Lord Chancellor Cottenham held, that the father of the lady, in approving of the proposals, must be considered to have acted, not adversely to, but on behalf of his daughter; and that there was no sufficient evidence to show that the proposals constituted the final contract of the parties, and had not been varied by some subsequent agreement prior to the execution of the settlement.

Articles construed with reference to subject-matter.

In the same case it was held that articles are always to be construed with reference to the subject-matter. And, accordingly, where the articles related solely to English subject-matter, a clause barring Scottish *legitim* could not (in the absence of

(*r*) *Mignan v. Parry* (1862), 31 Beav. 211.

(*s*) *Marquis of Breadalbane v. Marquis of Chandos* (1836), 2 Myl. & Cr. 711.

(*t*) *Legitim* is a term of Scotch law, importing a child's proportionate share of the parent's personal estate, which the parent cannot defeat by testamentary disposition.

express words) be supposed to have been in contemplation of the parties (*u*). But evidence is admissible to show that the articles were the final agreement between the parties, and that the difference between them and the settlement was caused by mistake; and in such a case the Court ordered the settlement to be rectified by the articles (*x*).

Chap. X. s. 1.

Evidence admitted to show that articles were the final contract.

It may happen that the articles themselves do not correctly express the intention of the parties; and where the mistake is clearly established, they, like all other instruments, will be reformed. Thus, in the case of *The Duke of Bedford v. The Marquis of Abercorn* (*y*), where articles before marriage stipulated that estates should be limited to the first and other sons of the marriage in tail, it was proved that the real intention was to limit the estates to the first and other sons in tail male; and the Court, after the marriage, directed that, in the settlement to be executed, limitations as corrected by the evidence should be inserted.

Where articles themselves are incorrect.

The question, what evidence it is necessary to adduce in order to establish the real intention of the parties, was also discussed in this case; and it seems that articles may be corrected on the same evidence which suffices to rectify an executed settlement (*z*). Lord Cottenham, L. C., in delivering judgment, said (*a*):—

Evidence admissible.

“If a settlement had been actually executed, in conformity with these articles, and it could be shown by proper evidence, that some provision in it had been inserted by mistake, and contrary to the intention of the parties, and to the contract previously made between them, it would have been within the province of the Court to have corrected the error, and altered the settlement accordingly. There cannot, therefore, be any doubt of the authority and the jurisdiction of the Court, to correct any errors which may be proved to have arisen in framing the agreement which the parties actually signed.”

(*u*) But a different doctrine was apparently propounded in *Duke of Bedford v. Marquis of Abercorn* (1836), 1 Myl. & Cr. 312.

D. 655; *Welman v. Welman* (1880), 15 Ch. D. 570; *James v. Couchman* (1885), 29 Ch. D. 212.

(*x*) *Bold v. Hutchinson* (1855), 5 De G., M., & G. 558; and see cases cited in White & Tud. L. C. 7th ed., vol. 2, p. 798.

(*z*) As to the admission of parol evidence in cases of rectification, see Taylor on Evidence, 9th ed., par. 1139.

(*y*) (1836), 1 Myl. & Cr. 312. See also *Lovesey v. Smith* (1880), 15 Ch.

(*a*) *Duke of Bedford v. Marquis of Abercorn* (1836), 1 Myl. & Cr. p. 331.

Chap. X. s. 1. If, therefore, parol evidence is admissible to show the real intention of the parties after a settlement has been executed, it will *a fortiori* be admissible where articles only have been entered into.

In *Smith v. Iliffe* (b), a marriage settlement was executed, in pursuance of articles made under an order of the Court on the marriage of a lady, an infant and a ward of Court, whereby personalty of the wife was limited, after the death of the husband and in default of children, both of which events happened, as the wife should by will appoint, and in default of appointment to her next of kin. Upon her uncontradicted but uncorroborated evidence that she never understood that she was to be deprived of the control of her own property in the event of her becoming a widow and childless, it was held that she was entitled to have the settlement rectified by limiting the property in the events which had happened to herself absolutely. This was effected by endorsing on the settlement the declaration of the Court.

Where settlement decreed against purchasers.

A settlement will not be decreed as against purchasers for value (an expression which includes mortgagees) without notice of the articles, but it will be decreed against them if they have notice (c).

Articles directing the insertion of "all usual powers," &c.

Where the articles in general terms directed the insertion in the settlement of "all usual powers," &c., a question frequently arose, what powers were included in such words. Thus, in giving effect to these words, powers of leasing, selling, exchanging, and re-investing of varying securities (d) and powers of partition where there was any joint property, as well as powers of appointing new trustees (e), which latter are now

(b) (1875), L. R., 20 Eq. 666. See also *Cook v. Fearn* (1879), 27 W. R. 212; *Edwards v. Bingham* (1879), 28 W. R. 89; *Stanley v. Pearson* (1879), 13 Ch. D. 545; *Lovesey v. Smith* (1880), 15 Ch. D. 655; *Cogan v. Duffield* (1876), 2 Ch. D. 44, at p. 49. Slight evidence will be sufficient to satisfy the Court when there is a strong probability upon the instrument that a mistake has

been made. See *In re De la Touche's Settlement* (1870), L. R., 10 Eq. 599.

(c) *Warrick v. Warrick* (1745), 3 Atk. 291; *Davies v. Davies* (1841), 4 Beav. 54; and see Sugden, V. & P. 781, 14th ed.

(d) *Sampayo v. Gould* (1842), 12 Sim. 426.

(e) Lewin on Trusts, 11th ed., p. 140; the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 31.

unnecessary, have been inserted in the settlement (*f*); and Chap. X. s. 1. although, as before observed, articles are to be construed with reference to their subject-matter, yet where a stipulation was made by ante-nuptial articles that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually found in settlements made in England, this was held to authorize the insertion of a power of sale and exchange under which lands in England might be taken in exchange for lands in Ireland; Lord Cottenham remarking that he could "see nothing in the contract to make it necessary to restrict the power to Ireland" (*g*).

"There is," said Sir L. Shadwell, "a palpable distinction between inserting in a settlement powers for the management and better enjoyment of the settled estates which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to raise money for any particular purpose, &c." (*h*); and accordingly powers of jointuring and charging require clearer evidence of intention to insert them than the expression "the usual powers" (*i*).

In the case of *The Duke of Bedford v. Marquis of Abercorn* (*k*), a power was reserved in ante-nuptial articles to husband and wife to alter and vary the provisions of the articles as they should think fit. This was held not to authorize the insertion in the settlement, after marriage, of a power enabling the husband to jointure a future wife, or to charge portions for the younger children of a future marriage. And where certain powers were expressly specified in the articles, the direction to

(*f*) *Peake v. Penlington* (1813), 2 Ves. & Beav. 311; *Hill v. Hill* (1834), 6 Sim. 136. See now the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3.

(*g*) *Sampayo v. Gould*, *ubi supra*. See also *Lindow v. Fleetwood* (1835), 6 Sim. 152; *Duke of Bedford v. Marquis of Abercorn* (1836), 1 Myl. & Cr. 312. But see *Marquis of Breadalbane v. Marquis of Chandos*

(1836), 2 Myl & Cr. 711.

(*h*) *Sampayo v. Gould* (1842), 12 Sim. 426.

(*i*) Jarm. Bythewood, 4th ed., vol. 6, p. 206; *Higginson v. Burneby* (1826), 2 Sim. & Stu. 516; and see *Sackville-West v. Holmesdale* (1870), L. R., 4 H. L. 543; *Welman v. Welman* (1880), 15 Ch. D. 570.

(*k*) (1836), 1 Myl. & Cr. 312.

Chap. X. s. 1. insert "the usual powers" in the settlement was held not to extend them (*l*).

New Acts conferring powers.

But this question is now of little importance, for the "usual powers" are now for the most part supplied by the Conveyancing Acts of 1881 and 1882, and the Settled Land Act, 1882 (*m*).

Practice.

Under the Trustee Relief Act, 1847 (10 & 11 Vict. c. 96), the Court had power, on petition, to decree the rectification of settlements (*n*).

Usual clauses in settlements.

It has been held in a modern case that the insertion in a marriage settlement of a covenant by the intended wife to settle her other property not expressly settled, or agreed to be settled by the settlement, is not a "usual clause," which expression means a clause usual and proper in the opinion of the draftsman to carry into effect the express terms of the settlement agreed upon (*o*).

Divorce and Matrimonial Causes Acts.

By the Divorce and Matrimonial Causes Acts (20 & 21 Vict. c. 85, and 22 & 23 Vict. c. 61), extensive powers of dealing with settled property upon a divorce are conferred upon the Court; and these powers can now, by virtue of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3, be exercised notwithstanding that there are no children of the marriage. The trustees of the settlement cannot be heard in support of an application to the Court to alter the settlement, but they may be heard in opposition to such an application (*p*).

The Court has, however, power to entertain an application by the guilty party to vary settlements (*q*).

It has been held in a recent case, that a clause in a settle-

(*l*) *Pearse v. Baron* (1821), Jac. 158.

(*m*) 44 & 45 Vict. c. 41; 45 & 46 Vict. c. 39; 45 & 46 Vict. c. 38.

(*n*) *Lewis v. Hillman* (1852), 3 H. L. Cas. 607; *Re De la Touche's Settlement* (1870), L. R., 10 Eq. 599; *In re Bird's Trusts* (1876), 3 Ch. D. 214. See, however, *Re Malet* (1862), 30 Beav. 407. As to the present procedure with regard to the recti-

fication of deeds, see *Hoffe's Estate, In re* (1900), 48 W. R. 507; and Judicature Act, 1873, s. 34, (subsect. 3).

(*o*) *Maddy, In re*, (1901) 2 Ch. 820, at p. 823.

(*p*) *Corrance v. Corrance* (1868), L. R., 1 P. & M. 495.

(*q*) *Wootton-Isaacson v. Wootton-Isaacson*, (1902) P. 145.

ment, made by a father upon the marriage of his daughter, Chap. X. s. 1. providing for the ultimate destination of the settled property in the event of his daughter dying during coverture without issue, does not become operative by reason of a determination of the coverture by divorce (*r*). Nor does a covenant in a settlement to settle "all after-acquired property during the marriage" bind personalty acquired subsequently to a judicial separation (*s*).

As a general rule, a clause in marriage articles providing for a subsequent separation will not be enforced, and any instrument, so far as it provides for such an event, will not be carried into effect, and such a clause has been held void whether in articles or in a settlement, and whether the instrument was post-nuptial or ante-nuptial (*t*).

Clauses contemplating separation.

Recent decisions have, however, rather impugned the universality of the proposition. Thus, in a recent case (*u*), where by a post-nuptial settlement a husband assigned chattels real upon trust to pay the rent to his wife for life, or alternatively during co-habitation or widowhood; on a subsequent separation by mutual consent, it was held that such a disposition was not against public policy, and that after the separation the trust in the wife's favour determined.

Marriage articles will be enforced on behalf of the husband, though he has not fulfilled his part of the agreement. An example of this is furnished by a case where there was an agreement by the wife's father to settle three-tenths of his estate, and the husband agreed to settle 2,000*l.* and insure his life. He effected no insurance, no settlement was executed, and the wife died without issue: it was held that he was entitled to prove in the administration of the father's estate in respect of his life interest in three-tenths of such estate, the performance

Enforcement of marriage articles though consideration on one side fail.

(*r*) *Crawford's Settlement, In re*, (1903) 1 Ch. 11. *Westmeath v. Westmeath* (1820), Jac. 126; *Cocksedge v. Cocksedge* (1844),

(*s*) *Davenport v. Marshall*, (1902) 14 Sim. 244; 5 Hare, 397.

1 Ch. 82. (*u*) *Hope-Johnstone, In re*, (1904)

(*t*) *H. v. W.* (1851), 3 K. & J. 1 Ch. 470. See also *Marlborough* 382; *Cartwright v. Cartwright* (*Duchess of*) *v. Marlborough (Duke of)*, (1901) 1 Ch. 165, C. A. (1853), 3 De G., M. & G. 982;

Chap. X. s. 1. by one party not being a condition precedent to his right to claim against the other; though, if the wife or any issue were alive, the Court would take care that the husband obtained no benefit until he had performed his part of the agreement (*x*).

Marriage articles will also be enforced on behalf of the wife (*y*), although the money consideration moving from her has not been paid; as where there was an agreement by the intended husband to settle a jointure in consideration of a portion given by the wife's father, though the portion was not paid, yet the wife took her jointure (*z*); and this, although she was living in a state of adultery. At common law, dower was not forfeited by adultery. The forfeiture of dower was introduced by the Statute of Westminster 2, c. 34. A jointure is not forfeited by adultery; and the Court will interpose at the suit of a wife to compel the performance of marriage articles, though her husband prove that she is guilty of the grossest infidelities (*a*).¹

Case of wife's
adultery.

(*x*) *Jeston v. Key* (1871), L. R., 6 Ch. 610; and see *Haden, In re*, (1898) 2 Ch. 220.

(*y*) *Bentinck, In re* (1899), 80 L. T. 71.

(*z*) *Perkins v. Thornton* (1740), 1 Amb. 502.

(*a*) *Seagrave v. Seagrave* (1807), 13 Ves. 439, 443. *Per* Lord Chancellor Talbot: "The articles being, that the husband shall settle such and such lands in certainty on his wife, the plaintiff, for her jointure; this is pretty much in the nature of an actual and vested jointure, in regard to what is covenanted for a good consideration to be done, is considered in equity in most respects as done; consequently this is a jointure, and not forfeitable either by adultery or an elopement. The reason of the difference why a wife

in case of an elopement with an adulterer forfeits her dower, and yet the husband leaving his wife and living with another woman does not forfeit his tenancy by the curtesy, is because the Statute of Westminster 2, c. 34, does, by express words, under these circumstances create a forfeiture of dower. But there is no Act inflicting in the other case the forfeiture of a tenancy by the curtesy:" *Sidney v. Sidney* (1734), 3 P. Wms. at p. 276; *Evans v. Carrington* (1860), 6 Jur., N. S. 268; 2 De G., F. & J. 481; where it was held by V.-C. Wood that the Court of Chancery had no jurisdiction to relieve a husband from the stipulations in his marriage settlement, upon a decree for dissolution of marriage being made by the Divorce Court.

SECTION II.

ANTE-NUPTIAL SETTLEMENTS.

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A settlement made in contemplation of marriage does not seem to become binding on the intended husband and wife until the marriage has actually taken place. According to the civil law, matrimonial conventions and settlements are subject to the implied condition *si nuptiæ sequantur* (b). And it has been

How far settlements can be varied or revoked before marriage.

(b) 6 Pothier (Ed. Dupin.), 46, 47.

Chap. X. s. 2. held that, where the marriage was void, a settlement made in anticipation of it was likewise invalid, and that the parties might make a new settlement; which, if followed by a proper marriage, was as effectual as though the first settlement had never been executed. This was the case in *Robinson v. Dickenson* (c), where it appeared that, in contemplation of a marriage, certain settlements were made, of real estate belonging to the intended wife, and of personalty belonging to the intended husband, upon trusts to arise after the marriage, for the benefit of the husband and wife and their issue. The marriage was solemnized, and the parties lived together as husband and wife. But after the lapse of some time, it was discovered that the marriage (for want of the requisite consent under Lord Hardwicke's Act) (d) was void; whereupon deeds were executed purporting to revoke the former settlements. And some time afterwards a new settlement in contemplation of marriage was made including the same property, but differing from the former deeds in the interests given to the issue, and in other particulars. The parties then validly intermarried, and had issue. In these circumstances Lord Chancellor Lyndhurst said that the Court "will not hold that a transaction, founded entirely on mistake and misapprehension of the parties, ought to be considered as binding on them"; and he accordingly decided that the first settlements were not binding; and that the rights of the parties, both as to the real estate and the personalty, must be governed by the second settlement.

When the marriage does not take place.

When no valid marriage is possible, as between a man and his deceased wife's sister, a settlement, in which the intended marriage is recited, and by which property is conveyed to trustees, in trust for the settlor until the solemnization of the marriage, and after the solemnization thereof, in trust for the parties and their issue, creates a continuing trust for the settlor, and the trusts subsequent to the intended marriage never arise (e). But a settlor can, in contemplation of such a union, create a complete and irrevocable voluntary settlement, which

(c) (1827), 3 Russ. 399.

(d) See *ante*, pp. 7—8.

(e) *Chapman v. Bradley* (1863),

4 De G., J. & S. 71; *Pawson v. Brown* (1879), 13 Ch. D. 202; *Phillips v. Probyn*, (1899) 1 Ch. 811.

cannot afterwards be impeached either by himself or by his representatives (*f*). And where a *feme sole*, in contemplation of a marriage which never took effect, settled personalty upon trusts for herself till the marriage, and then upon certain trusts for her issue, and the contemplated marriage never took place, but she married another person, it was held that the settlement was irrevocable (*g*). Chap. X. s. 2.

But in the case of *Page v. Horne* (*h*), the question discussed before Lord Langdale was, whether, after the execution of an ante-nuptial settlement, the intended husband and wife had power, before the solemnization of the marriage, to revoke the deed by which a mortgage of a sum of 1,500*l.* had been assigned to trustees upon certain trusts for the benefit of the parties and the issue of the intended marriage. The settlement in this case was not executory. The property was legally vested on certain trusts. Thirteen days after the execution of the deed and before the marriage, the intended husband and wife, having changed their minds, revoked it; and after the marriage the husband filed his bill, claiming the property under his marital right, as if there had been no settlement. The Court directed a reference to inquire under what circumstances the revocation had been executed. And on the cause coming on for further directions upon the master's report, Lord Langdale, under the circumstances of the case, dismissed the husband's bill, the lady not having had any independent advice or consultation with her friends. The learned judge admitted that the parties had a right to break off the contract of marriage and revoke the deed of settlement if they chose to do so, or to call on the trustees to execute other deeds, and that they might under proper circum-

In case the marriage does take place.

(*f*) *Ayerst v. Jenkins* (1873), L. R., 16 Eq. 275. See also *Valance, In re* (1884), 26 Ch. D. 353, a case of cohabitation without marriage.

(*g*) *McDonnell v. Hesilrige* (1852), 16 Beav. 346. See, however, *Essery v. Cowlard* (1884), 26 Ch. D. 191.

(*h*) (1846), 9 Beav. 570; 11 Beav. 227. It seems that Lord Lang-

dale's decision in this case might have been different if there had been any interruption of the intention to celebrate the marriage, or if the lady had acted independently of her husband upon a consultation with her friends. But see *contra*, *Thomas v. Brennan* (1846), 15 L. J., Ch. 420; *Mitford v. Reynolds* (1848), 16 Sim. 130.

Chap. X. s. 2. stances have entered into a new contract or made another contract giving the husband the whole interest in the fund. And a similar decision was arrived at in a later case (*i*), where, in contemplation of marriage, an intended wife and her father executed the engrossment of a settlement, which was then given into the custody of the solicitors of the intended husband, but was not executed by him or the trustees. The engagement was subsequently broken off by agreement. After the lapse of over three years, the Court declared the engrossment void as a settlement, and ordered it to be given up.

When, however, the contract is followed by a valid marriage, had in pursuance of it, the settlement is not only binding, but in all respects irrevocable; so that no directions in the will of the settlor, nor the state of his affairs at his decease, can alter its construction (*k*). This proposition must, however, it is submitted (even when actual fraud is not proved), be taken with this qualification: that where the settlement is of an improvident character, and there has been no independent advice, the Court, upon well-known principles, will decree its rectification (*l*).

Where consideration moving from husband is executory, or his covenant is contingent.

Even where the husband is by the settlement a purchaser of his wife's choses in action, it is to be observed that if the provision for his wife and children be executory (*i.e.*, resting upon covenant), neither he nor his assignees will be allowed to recover them in equity, until the obligations of the settlement have been specifically performed. Thus in *Corsbie v. Free* (*m*), in consideration as well of 1,500*l.* of the wife's money which the husband was to have to his own use, as of a vested interest belonging to her of the value of 4,000*l.* in the residuary estate of a testator, divisible on the death of a tenant for life—the husband by the settlement covenanted that his heirs, executors or administrators should immediately after his decease pay to

(*i*) *Bond v. Walford* (1886), 32 Ch. D. 238. Ch. 243; *Turnbull v. Duval*, (1902) A. C. 429; *Bischhoff's Trustee v. Frank* (1903), 89 L. T. 188.

(*k*) *Vandeleur v. Vandeleur* (1835), 3 Cl. & Fin. 82; and see *Barron v. Willis* (1899), 81 L. T. 321 (a post-nuptial contract).

(*l*) See *Powell v. Powell*, (1900) 1

(*m*) (1840), Cr. & Phil. 64; *Pyke v. Pyke* (1749-50), 1 Ves. sen. 376; *Mitford v. Mitford* (1803), 9 Ves. 87, 96.

the trustees of the settlement the sum of 4,000*l.* to be held on Chap. X. s. 2. certain trusts for the wife and children of the marriage; but with a proviso that they should pay all other debts which the husband should owe at his death, in preference to the 4,000*l.*, and that they should not be bound to pay the 4,000*l.* unless the assets of the husband should be more than sufficient to pay all his other debts. Before the death of the tenant for life the husband became bankrupt. Then the tenant for life died. Afterwards the husband himself died, leaving his wife him surviving. In these circumstances it was held by Lord Chancellor Cottenham that the assignees were not entitled to receive her share without performing the husband's covenant.

But if the covenant be contingent, and the husband's right immediate, the latter will not be postponed. Thus, suppose the husband to have covenanted that his executors should pay his wife a sum of money, *if she survived him*, he would, if a purchaser by the settlement of her choses in action, be at liberty to sue for them at once, without making provision for the contingency (*n*); the fact of the husband or wife being either actually or impliedly aware of the contents of the deed and accepting the benefits conferred thereby making him or her by implication a party to the contract (*o*).

A covenant to settle other existing and after-acquired property of the wife, although held not to be in all cases a usual covenant (*p*), was, and probably will continue to be, frequently inserted in marriage settlements. The object with which such a covenant was inserted was partly to prevent the property from vesting in the husband, and partly to secure it for the benefit of the issue. Under the Married Women's Property Acts the *jus mariti* is during the coverture entirely abolished; and, accordingly, there is now no necessity to insert the covenant in order to deprive the husband of any interest in the property of his wife. It may, however, be desirable to save the wife from the coercion or blandishments of her husband, and to place

Covenants to settle after-acquired property of the wife.

(*n*) *Basevi v. Serra* (1807), 14 L. T. 71; *Hadon, In re*, (1898) 2 Ves. 313. Ch. 220.

(*p*) *Maddy, In re*, (1901) 1 Ch. 711.

Chap. X. s. 2. beyond her control, as a safe provision for her children, whatever property she may be possessed of or entitled to at the time of the marriage, or which she may subsequently acquire. With this object the covenant, which should always contain the words "for her separate use" (*q*), may still be advantageously adopted; but it must be remembered that (at all events if the wife is a separate trader) such a covenant is liable to be impeached under the provisions of the bankrupt law (*r*); it being provided by sect. 1 of the Married Women's Property Act, 1893, that—

"Every contract hereafter entered into by a married woman, otherwise than as an agent—

"(a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

"(b) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(c) Shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;"

except any separate property . . . which at the time of making the contract (*s*) she is restrained from anticipating (*t*).

The alteration of the law, whereby the husband takes during the coverture no interest in his wife's property, also affects the form of the covenant, which should for the future be framed as the covenant of the wife, since she alone will be able to give effect to its provisions.

Construction of covenants to settle after-acquired property in recent cases.

It has been held that covenants to settle after-acquired property do not include:—Investments made with the savings of a wife's income derived from the settled property (*u*); or gifts presented to her by her husband subsequently to the marriage (*x*); or life interests or annuities, when there is no indication in the settlement of a specific intention to include such interests (*y*);

(*q*) *Lumley, In re*, (1896) 2 Ch. 690.

(*r*) *Wheeler's Settlement Trusts, In re*, (1899) 2 Ch. 717.

(*s*) See *Barnett v. Howard*, (1900) 2 Q. B. 784.

(*t*) The effect of this section is absolutely to reverse the old law on the subject as decided by the

Court of Appeal in *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454.

(*u*) *Clutterbuck's Settlement, In re*, (1905) 1 Ch. 200; *Finlay v. Darling*, (1897) 1 Ch. 719.

(*x*) *Coles v. Coles*, (1901) 1 Ch. 711.

(*y*) *Dowding's Settlement Trusts, In re*, (1904) 1 Ch. 441.

or personal property inherited by the wife subsequently to a decree for judicial separation (z); or (by the law of Scotland (a)) proceeds of a policy of insurance effected by a man, in anticipation of marriage, on his life payable to his wife, on his decease, if she be then living: upon the logical ground that the sum due under the policy was not property which pertained to the wife during the subsistence of the marriage (b).

It has also been held that a covenant to settle after-acquired property does not include settled property conditioned to fall into the possession of the trustees of the settlement upon the decease of the settlor, when such decease occurred subsequently to the dissolution of the marriage by divorce (c). But, on the other hand, it has been held, that a marriage settlement containing a covenant to settle all property to which the wife, or the husband in her right, should during the said intended marriage become beneficially entitled in possession or reversion, bound a reversionary interest which fell into possession subsequently to a judicial separation being decreed between husband and wife (d). And a similar rule has been held to apply where a testator bequeathed to his married daughter (whose marriage settlement contained an "after-acquired" property clause) freehold property and money, for her sole and separate use, independent of any husband she might marry, without power of anticipation (e).

Cases of construction may still occasionally arise upon covenants framed in accordance with the previous law (f), the question to be determined being whether some particular property is or is not bound by the terms of the covenant; and this is simply one of intention which is to be collected from the settlement (g).

Construction of these covenants under old law.

(z) *Davenport v. Marshall*, (1902) 1 Ch. 82.

(a) As to English law, see 45 & 46 Vict. c. 75, s. 11.

(b) *Coulson's Trustees* (1901), 3 F. 1041, Ct. of Session.

(c) *Crawford's Settlement, In re*, (1905) 1 Ch. 11.

(d) *Davenport v. Marshall*, (1902) 1 Ch. 82.

(e) *Russell v. Lauder* (1904), 1 Ir. R. 328.

(f) See *Re Stonor's Trusts* (1883), 24 Ch. D. 195; and note the saving of existing settlements by sect. 19 of Act of 1882.

(g) *Ramsden v. Smith* (1854), 2 Drew. 298, 302; *Re Blockley* (1884), 32 W. R. 385. For detailed investigation of this subject, see Vaizey on Settlements, pp. 230—262.

Chap. X. s. 3.

The covenant which has to be construed may be expressed to be that of the husband and the wife, of the husband alone, or of the wife alone; or (and this is the form which has been most usually adopted in recent times) it may be framed as the agreement of all parties (*h*). In the case last mentioned, the agreement operates as a covenant by each of the parties in respect of the acts agreed to be done by him or her (*i*), and it will not be construed as a covenant by the husband in respect of separate property of the wife, over which he, of course, has no control (*k*).

In considering questions of construction as to the operation of these covenants, it must be borne in mind that each party covenants only as to what he or she can perform, and that the ordinary agreement of all parties constitutes a covenant by each in respect of the interests taken by him or her. But a covenant for settlement of after-acquired property of the wife, even if entered into by the husband alone, will apparently, by virtue of sect. 19 of the Married Women's Property Act, bind all her property as completely as though that Act had never been passed (*l*).

If the wife is bound by the covenant she must settle property coming to her for her separate use (*m*); and where she was an infant at the time of the marriage it has been held that the

(*h*) As regards joint covenantors, see *Haden, In re*, (1898) 2 Ch. 220; *Bentinck, In re* (1899), 80 L. T. 71.

(*i*) *Ramsden v. Smith* (1854), 2 Drew. 298; *Smith v. Lucas* (1881), 18 Ch. D. 531; and see *Edwards v. Carter*, (1893) A. C. 360; *Hodson, In re*, (1894) 2 Ch. 421.

(*k*) *Dawes v. Tredwell* (1881), 18 Ch. D. 354. The separate property of the wife is, *à fortiori*, not bound by the covenant of the husband alone: *Travers v. Travers* (1840), 2 Beav. 179; *Douglas v. Congreve* (1836), 1 Keen, 410; *Grey v. Stuart* (1861), 30 L. J., Ch. 884. In *Lee v. Lee* (1876), 4 Ch. D. 175, a cove-

nant by the husband alone to settle specific property of the wife was held after her death to be binding upon her, inasmuch as the agreement was entered into for valuable consideration, and the wife had assented thereto. As to when such assent will be implied, see *Haden, In re, supra*.

(*l*) *Stevens v. Trevor-Garrick*, (1893) 2 Ch. 307.

(*m*) *Milford v. Peile* (1853), 17 Beav. 602; *Smith v. Lucas* (1881), 18 Ch. D. 531; *In re Allnutt* (1883), 22 Ch. D. 275; *Scholfield v. Spooner* (1884), 26 Ch. D. 94; not following *In re Mainwaring's Settlement* (1866), L. R., 2 Eq. 487.

covenant, if for her benefit, was voidable and not void; and that she might, after attaining twenty-one, and during the coverture, elect whether the covenant should be binding on her separate estate or not (*n*). An exception of property "otherwise settled" had, it seems, the effect of excluding from the operation of the covenant property to which the wife became entitled for her separate use (*o*), the husband being bound only so far as he is able to give effect to the covenant or agreement (*p*). Chap. X. r. 2

As already stated, annuities are not caught by the after-acquired property clause (*q*); but on the other hand, it has been held that a covenant by an infant to settle after-acquired property extended to an interest acquired under the will of a person who died subsequently to the execution of the settlement (*r*). And this rule would apply *a fortiori* to an adult entering into such a covenant.

The time at which the property is acquired in some cases affects the question, whether it is bound by the covenant or not. For this purpose property may be considered as divided into three classes:—(1) property belonging to the wife at the time of the settlement; (2) property acquired during the coverture; and (3) property acquired after its termination (*s*). What property is bound by the covenant.

There may also be cases where the wife had, at the time of the settlement, a contingent or reversionary interest which subsequently, either during or after the coverture, fell into

(*n*) *Smith v. Lucas*, *ubi supra*. See *Wilder v. Pigott* (1883), 22 Ch. D. 263, where it seems to have been held that a married woman could confirm the settlement generally, and not merely so far as it affected the property of which she was then possessed. See also the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62); and see *Stevens v. Trevor-Garrick*, *supra*.

(*o*) *Kane v. Kane* (1880), 16 Ch. D. 207; and see *Coventry v. Coventry* (1863), 32 Beav. 612.

(*p*) *Daves v. Tredwell* (1881), 18 Ch. D. 354.

(*q*) *Dowding's Trusts, In re*, (1904) 1 Ch. 441.

(*r*) *Johnson, In re*, (1891) 3 Ch. 48.

(*s*) There is no reported case in which the property was acquired after the execution of the settlement and before the marriage; but it is conceived that this period may be treated for purposes of construction as part of the period of coverture, unless the words "during the coverture" occur in the covenant, in which case it must be annexed to the preceding period.

Chap. X. s. 2. possession, or where the wife acquired during the coverture a reversionary interest which did not fall into possession until after its termination, and these, although not really distinct from the three classes referred to, occasionally add some difficulty to the interpretation of particular covenants. For the date of acquisition is sometimes regarded as that of the complete possessory title, and sometimes as that of the wife's obtaining a vested interest.

It is with reference to these several classes of property that the scope of the covenant under consideration has to be tested; and, as the actual interests which subsequently arise cannot be definitely foreseen when the covenant is framed, it is not surprising that difficult questions of construction have, in many cases, presented themselves for the decision of the Courts. In order to furnish a guide for the interpretation of covenants for the settlement of the wife's property, it will be desirable to ignore, as far as possible, the individual features of particular cases; and to extract from the decisions the principles upon which they have proceeded.

Two classes
of covenant.

The various covenants in all the reported cases may be divided into two groups, viz., those which relate solely to after-acquired property and those which include, in addition to this, the present property of the wife. The former is a covenant to settle "all the property to which the wife or the husband in her right may at any future time become entitled"; the latter, a covenant to settle "all the property to which the wife *now is*, or to which she or the husband in her right may at any future time become entitled." These types, from which all subsidiary provisions are excluded, must be carefully discriminated, in order to understand the numerous decisions on this subject.

As to future
property only.

I. As to covenants for the settlement of after-acquired property.

These covenants, containing words of futurity, but none relating to present interests, comprise property which falls into possession during the coverture (*t*), even though the wife had

(*t*) *Archer v. Kelly* (1860), 1 Dr. & Sm. 300; *Re Clinton's Trust* (1871), L. R., 13 Eq. 295.

at the date of the settlement a reversionary (*u*) or contingent interest (*x*) therein. Nor can an infant covenantor withdraw such property from the trusts of the settlement, when it falls into possession, without electing to relinquish all benefits accruing from other property comprised in the settlement (*y*). But the change from a contingent to a vested reversionary interest which does not fall into possession until after the coverture, is not sufficient to satisfy the words of futurity (*z*).

It has been held (*a*) that a covenant by the husband to settle, upon the trusts of the settlement, any property which his wife or he in her right should thereafter during the coverture succeed to the possession of or acquire, bound a sum of money in which, at the time of the marriage, the wife had a reversionary interest expectant on her own death without issue, and without having exercised a power of appointment. In this case, which has been often questioned, the husband was the survivor, and the decision of the Court, if it is to be supported, must rest on the reasoning of the Master of the Rolls, whereby he connects the husband's right to administration upon the death of his wife with the inchoate title which he acquired during the coverture. Covenants for the settlement of the wife's after-acquired property do not comprise existing property in possession (*b*), even if its

(*u*) *Blythe v. Granville* (1842), 13 Sim. 190; *Exp. Blake* (1853), 16 Beav. 463; *Spring v. Pride* (1864), 4 De G., J. & S. 395; *Re Clinton's Trust*, *supra*.

(*x*) *Archer v. Kelly*, *supra*; *Brooks v. Keith* (1861), 1 Dr. & Sm. 462.

(*y*) *Codrington v. Codrington* (1875), L. R., 7 H. L. 854; *Carter v. Silber*, (1892) 2 Ch. 278, C. A.

(*z*) *Re Michell's Trusts* (1877), 9 Ch. D. 5; reversing the decision of Malins, V.-C., 6 Ch. D. 618.

(*a*) *Grafftey v. Humpage* (1838), 1 Beav. 46; affirmed on appeal, 3 Jur. 622. This case has been followed in *Re Hughes' Trusts* (1863),

4 Giff. 432; *Rose v. Cornish* (1867), 16 L. T. 786: referred to its special circumstances in *Hoare v. Hornby* (1843), 2 Y. & C. C. C. 121; *Wilton v. Colvin* (1856), 3 Drew. 617; *Re Wyndham's Trusts* (1865), L. R., 1 Eq. 290; *Re Clinton's Trust* (1871-2), L. R., 13 Eq. 295; and disapproved of in *Archer v. Kelly*, *supra*.

(*b*) *Hoare v. Hornby* (1843), *supra*; *Otter v. Melville* (1848), 2 De G. & Sm. 257; *Archer v. Kelly* (1860), *supra*; *Re Wyndham's Trusts* (1865), *supra*; *Re Browne's Will* (1868-9), L. R., 7 Eq. 231; *Re Pedder's Settlement Trusts* (1870), L. R., 10 Eq. 585.

Chap. X. s. 2. amount has not been ascertained (*c*); nor existing reversions which remain without change during the coverture (*d*), or which merely become vested in interest, but not in possession (*e*). But reversionary interests which accrue during the coverture, even if they do not fall into possession until after its determination, are held to be bound by the covenant of the husband and wife (*f*), and by that of the husband alone if he survive his wife (*g*).

It has been held that property over which the covenantor has a general power of appointment is not within the clause (*h*). In the recent case of *In re O'Connell* (*i*), it has, however, been decided that a covenant to settle after-acquired property extends to property which is limited to such purposes as the covenantor shall appoint, and in default of appointment to him or her absolutely.

The better opinion seems to be that words of futurity in the husband's covenant are not satisfied by the interest which he may have acquired in the wife's property at the moment of marriage (*k*).

As to present
and future
property.

II. As to covenants for the settlement of present and future property.

In cases where the covenant is expressly extended so as to include existing interests of the wife not specifically mentioned in the settlement, property in possession and reversion, whether vested or contingent, and whether it exists at the date of the

(*c*) *Wilton v. Colvin* (1856), *supra*; *Churchill v. Shepherd* (1863), 33 Beav. 107.

(*d*) *Atcherley v. De Moulin* (1855), 2 K. & J. 186; *Re Wyndham's Trusts* (1865), *supra*; *Re Pedder's Settlement Trusts* (1870), *supra*; *Re Jones' Will* (1876), 2 Ch. D. 362; *Garnett, In re* (1886), 33 Ch. D. 300.

(*e*) *Re Michell's Trusts* (1878), 9 Ch. D. 5.

(*f*) *Butcher v. Butcher* (1851), 14 Beav. 222; *Dickinson v. Dillwyn* (1869), L. R., 8 Eq. 546; *Cowper-*

Smith v. Anstey, W. N. 1877, p. 28.

(*g*) *Townshend v. Harrowby* (1858), 27 L. J., Ch. 553; *Hughes v. Young* (1863), 32 L. J., Ch. 137; *Fisher v. Shirley* (1889), 43 Ch. D. 290.

(*h*) *Ewart v. Ewart* (1853), 11 Hare, 276.

(*i*) (1903) 2 Ch. 574.

(*k*) *Hoare v. Hornby*, *Archer v. Kelly*, *Churchill v. Shepherd*, all of which have been already cited *contra*; *Graffley v. Humpage* (1838), *supra*; and *James v. Durant* (1839), 2 Beav. 177.

settlement, or is subsequently acquired during the coverture, Chap. X. s. 2. will be bound by the covenant (*l*); even where the preceding interests were such as to render it impossible that the fund could fall into possession until after the death of both the husband and the wife (*m*).

A covenant to settle after-acquired property will in all cases be construed as applying only to interests acquired during the coverture, and not to property coming to the wife after the death of her husband, even if the words "during the coverture" are omitted (*n*); and notwithstanding that it is in form an assignment by the wife of all her future property (*o*). If the covenant is entered into by the husband alone, property given to the separate use of the wife is not bound by it (*p*); but if she is a covenanting party the property must be settled (*q*); and it seems that it is not in the power of a testator to exclude, except by a restraint on anticipation, a legacy to a married woman from the operation of such a covenant (*r*).

It is a general rule of construction which holds good in the case of these covenants, that operative words whose meaning is clear are not controlled by previous recitals (*s*), which can only be read to explain some doubt or ambiguity (*t*). Rule of construction.

(*l*) *Re Mackenzie's Settlement* (1867), L. R., 2 Ch. 345; *Agar v. George* (1876), 2 Ch. D. 706. See, however, *Atcherley v. Du Moulin* (1855), 2 K. & J. 186; *Dering v. Kynaston* (1868), L. R., 6 Eq. 210.

(*m*) *Cornmell v. Keith* (1876), 3 Ch. D. 767. See also *Re Jackson's Will* (1879), 13 Ch. D. 189.

(*n*) *Dickinson v. Dillwyn* (1869), L. R., 8 Eq. 546; *Carter v. Carter* (1869), *ibid.* 551; *Re Edwards* (1873), L. R., 9 Ch. 97; *Re Campbell's Policies* (1877), 6 Ch. D. 686; *Welstead v. Leeds* (1882), 47 L. T. 331; overruling *Stevens v. Van Voort* (1853), 17 Beav. 305.

(*o*) *Holloway v. Holloway*, W. N. 1877, p. 75.

(*p*) *Brooks v. Keith* (1861), 1 Dr. & Sm. 462; *Douglas v. Congreve* (1836), 1 Keen, 410, 423; *Travers*

v. Travers (1840), 2 Beav. 179; *Dawes v. Tredwell* (1881), 18 Ch. D. 354.

(*q*) *Butcher v. Butcher* (1851), 14 Beav. 222; *Milford v. Peile* (1854), 17 Beav. 602; *Willoughby v. Middleton* (1862), 2 J. & H. 344; *Campbell v. Bainbridge* (1868), L. R., 6 Eq. 269. As to when a covenant will be implied, see *Bentinck, In re* (1899), 80 L. T. 71; *Haden, In re*, (1898) 2 Ch. 220.

(*r*) *Re Allnutt* (1883), 22 Ch. D. 275; *contra, Re Mainwaring's Settlement* (1866), L. R., 2 Eq. 487; and see *Kane v. Kane* (1880), 16 Ch. D. 207; *Scholfeld v. Spooner* (1884), 26 Ch. D. 94.

(*s*) *Young v. Smith* (1865), L. R., 1 Eq. 180; *Dawes v. Tredwell* (1881), 18 Ch. D. 354.

(*t*) *Atcherley v. Du Moulin* (1855),

Chap. X. s. 2.

Nature of property may exclude it from covenant.

The nature of the property as well as the date of its acquisition may affect the question whether it is included in the covenant or not. Thus, in the absence of express provision for the conversion of terminable interests, property given to the wife for her life, whether with (*u*) or without (*x*) a restraint on anticipation, will not be bound by the covenant (*y*). Property given to the wife in such terms that a forfeiture of the gift would result from settling it in pursuance of the covenant seems to be outside the covenant; so, also, is a sum of money subject to a gift over, in case of the death of the wife without leaving a husband or issue her surviving (*z*); and a similar rule

2 K. & J. 186; *Wilton v. Colvin* (1856), 3 Drew. 617; *Re Michell's Trusts* (1878), 9 Ch. D. 5; and see *Toury's Settled Estate, In re* (1888), 41 Ch. D. 64, C. A.; *Liddell, In re* (1895), 73 L. T. 363; *Coghlan, In re*, (1894) 3 Ch. 76. The following cases may be usefully consulted on the meanings to be attributed to certain words or expressions of frequent recurrence in these covenants. "Die without having been married," *Smith's Settlement, In re*, (1903) 1 Ch. 373; *Brydone's Settlement, In re*, (1903) 2 Ch. 84, C. A.; disapproving *Mare, In re*, (1902) 2 Ch. 112; "die unmarried," equivalent to "discover at the time of death," *Woodhouse's Trusts, In re*, (1903) 1 Ir. R. 126; "name and arms," *Eversley, In re*, (1900) 1 Ch. 96; "accrue," *Hoare v. Hornby* (1843), 2 Y. & C. C. C. 121; *Mac-lurcan v. Lane* (1859), 7 W. R. 135; "become entitled," *Archer v. Kelly* (1860), 1 Dr. & Sm. 300; *Blythe v. Granville* (1842), 13 Sim. 190; *Re Clinton's Trusts* (1871), L. R., 13 Eq. 295; "be or become entitled," *Atcherley v. Du Moulin* (1855), 2 K. & J. 186; "come to," *Exp. Blake* (1853), 16 Beav. 463; "possessed," *Wilton v. Colvin* (1856), 3 Drew. 617. As to the exception of

property below a certain value, and the manner of estimating such value in the case of reversionary interests, see *Re Mackenzie's Settlement* (1867), L. R., 2 Ch. 345; *Bower v. Smith* (1871), L. R., 11 Eq. 279; *Steward v. Poppleton*, W. N. 1877, p. 29, where the report of *Bower v. Smith* (1871), in the authorized reports is stated by Jessel, M. R., to be defective in not stating that there was a gift over in default of appointment; *Hood v. Franklin* (1873), L. R., 16 Eq. 496; *Re Jackson's Will* (1879), 13 Ch. D. 189. It may be mentioned as one of the incidents of these covenants that they will effect a severance of a joint estate in cases where the interest, if sole, would be bound thereby: *Caldwell v. Fellowes* (1870), L. R., 9 Eq. 410; *Baillie v. Treharne* (1881), 17 Ch. D. 388.

(*u*) *Ewart v. Ewart* (1853), 11 Hare, 276; *Forster v. Davies* (1861), 4 De G., F. & J. 133.

(*x*) *Townshend v. Harrowby* (1858), 27 L. J., Ch. 553; and see *Duncan v. Cannan* (1855), 21 Beav. 307.

(*y*) *Dowding's Settlement Trusts, In re*, (1904) 1 Ch. 441.

(*z*) *Hilbers v. Parkinson* (1883), 25 Ch. D. 200.

applies to wife's savings of income from settled property (*a*) ; Chap. X. s. 2. or to a gift of money by a husband to his wife long after marriage (*b*) ; but where it is merely expressed to be "for her separate use independently of her husband," and the effect of the covenant would be to give the husband an interest in the property, it has been held to be bound (*c*).

Unless the covenant is so expressed as to include all property over which the wife has a power of disposition, she will not be obliged to settle property given to her in tail (*d*), or over which she takes a general power of appointment (*e*). But if the wife in exercise of the power appoints the property to herself, it becomes subject to the covenant (*f*).

A gift in default of appointment confers a vested interest subject to be divested by the exercise of the power (*g*). Accordingly such an interest devolving on the wife is bound by a covenant to settle her property ; but if an appointment is made to the person entitled in default, this creates a new interest ; and the question whether it is bound or not must be determined without reference to the previous interest (*h*) ; even, it seems, where the share taken is the same under the appointment and in default under the settlement creating the power (*i*).

A covenant by the husband to settle all his after-acquired property is rarely inserted in marriage settlements ; for it is difficult to give to such a covenant a reasonable construction, and in the event of the husband's subsequent bankruptcy, it is

Covenants to settle after-acquired property of the husband.

(*a*) *Clutterbuck's Settlement, In re*, (1905) 1 Ch. 200.

(*b*) *Coles v. Coles*, (1901) 1 Ch. 711 ; for other property not bound by covenant, see *ante*, p. 290.

(*c*) *Re Allnutt* (1883), 22 Ch. D. 275, not following *Re Mainwaring's Settlement* (1866), L. R., 2 Eq. 487 ; and see *Scholfield v. Spooner* (1884), 26 Ch. D. 94.

(*d*) *Hilbers v. Parkinson* (1883), 25 Ch. D. 200.

(*e*) *Ewart v. Ewart* (1853), *supra* ;

and see *Ramsden v. Smith* (1854), 2 Drew. 298, 306.

(*f*) *Ewart v. Ewart*, *supra*.

(*g*) See *Re Jackson's Will* (1879), 13 Ch. D. 189.

(*h*) *Sweetapple v. Horlock* (1879), 11 Ch. D. 745, where the previous cases, *Re Frowd's Trusts* (1864), 10 L. T. 367 ; *Re Vizard's Trusts* (1866), L. R., 1 Ch. 588 ; and *De Serre v. Clarke* (1874), L. R., 18 Eq. 587, are examined by the late Master of the Rolls, Sir G. Jessel.

(*i*) *Sweetapple v. Horlock*, *supra*.

Chap. X. s. 2. exposed to the risk of being declared void as against his trustee (k).

In *Lewis v. Madocks* (l) a contract on marriage to settle all the personal estate that the husband should at any time during the coverture be possessed of was construed to exclude income, unless it was laid up as capital, but to include real estate purchased with borrowed money. It seems doubtful how far an unlimited covenant of this description is, even when the husband is solvent at the date of the settlement, capable of being supported against his creditors. In *Ex parte Bolland* (m) the husband, who was a trader (n), by a settlement dated the 7th April, 1868, covenanted with the trustees, that all his future real and personal estate should be conveyed to the trustees upon the trusts thereby declared concerning certain specific items of property comprised in the settlement. In February, 1873, the husband, who was admitted to have been solvent at the date of the settlement, was adjudicated a bankrupt, and the covenant was declared void as against the trustee. Sir James Bacon, V.-C., in the course of his judgment, observed :—

“I am not aware of any case in which such a settlement as this has been held to be binding. . . . Nothing can be more directly opposed to the plain reason and justice and policy of the law than that a man, whether in fraud or not, should on his marriage undertake that whatever fragment of property he may acquire during the coverture down to the smallest particular, should be subject to the trusts which are supposed to be declared by this settlement. There are many cases in which such settlements have been set aside. There are many cases in which the policy of the law has been declared to be that a man cannot withdraw from his creditors, even in consideration of marriage, future property which he may acquire, if at the time other persons, namely, his creditors, have the right to be paid out of the property.”

The learned judge, in deciding this case, seems to have rested his decision upon general principles of law, and not to have

(k) *Reis, In re*, (1904) 1 K. B. 451.

(l) (1803 & 1810), 8 Ves. 150; 17 Ves. 48. See also *Gartshore v. Charlie* (1804), 10 Ves. 1; *Prebble v. Boghurst* (1818), 1 Swanst. 309; *Hardey v. Green* (1849), 12 Beav. 182.

(m) (1873), L. R., 17 Eq. 115; questioned in *Reis, In re, supra*.

(n) The distinction between traders and non-traders has been abolished by the Bankruptcy Act, 1883.

called in the aid of the 91st section of the Bankruptcy Act, Chap. X. s. 2. 1869 (*o*), which he has in a more recent case (*p*) held to be retrospective. By the 47th section of the Bankruptcy Act, Bankruptcy Act, 1883. 1883 (*q*), which is a re-enactment of the former section, with the important omission of the words "by a trader," it is enacted as follows:—

"Any covenant or contract made, in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy."

This section does not apply to a covenant by the husband to pay a sum of money to the trustees of the settlement, who will, in such a case, be admitted to prove in his bankruptcy (*r*).

It has, however, been held in a recent case (*s*), that sect. 49 of the Bankruptcy Act, 1883 (which protects *bond fide* transactions without notice), does not apply to a transaction voidable under sect. 47. This latter section applies only, however, when the transaction is subsequent to the date when the trustee's title accrues (*t*).

Where a trader was entitled, in default of appointment, to a share of his father's residuary estate, which the widow had power to appoint among himself and the other children, and by his marriage settlement covenanted to settle his share whether appointed or unappointed, it was held by Malins, V.-C. (*u*), that, although the share which he ultimately took was under, and not in default of, an appointment, he had an estate or interest in the property at the date of the marriage, which saved the covenant from the operation of the 91st section.

(*o*) 32 & 33 Vict. c. 71.

(*p*) *Exp. Dawson* (1875), L. R.,

19 Eq. 433.

(*q*) 46 & 47 Vict. c. 52.

(*r*) *Exp. Bishop* (1873), L. R., 8 Ch. 718.

(*s*) *Reis, In re*, (1904) 1 K. B.

451.

(*t*) *Carter & Kenderdine's Contract, In re*, (1897) 1 Ch. 776.

(*u*) *Re Andrew's Trusts* (1878), 7 Ch. D. 635.

Chap. X. s. 2.

Settlements
by insolvent
husband.

Settlements made before and in consideration of marriage are excepted from the operation of the Bankruptcy Acts (*x*); but, under the general law, such settlements made by the intended husband when he is practically insolvent will not be sustained if the intended wife is privy to the fraud (*y*).

Where, however, a post-nuptial settlement (reciting a parol ante-nuptial agreement), containing a forfeiture clause in case of bankruptcy, was made by a husband, who subsequently became bankrupt, it was held to be good against the trustee in bankruptcy, upon the grounds (1) that there was no evidence of intent to defeat creditors, and (2) that the recital of the ante-nuptial parol agreement in consideration of marriage satisfied the Statute of Frauds (*z*).

Property
coming from
any other
person than
the husband
may be for-
feited on his
bankruptcy or
insolvency.

Property coming from the wife, or her friends, or the friends of the husband, may be settled in such manner as to be forfeited by the husband on his bankruptcy or insolvency. This has been long since decided (*a*). But the interest must be such as to determine on that event; and where there was no power of applying the trust fund otherwise than for the benefit of the tenant for life, it was held that a proviso in a will restraining alienation did not prevent his interest from becoming vested in the assignee (*b*).

(*x*) 32 & 33 Vict. c. 71, s. 91; 46 & 47 Vict. c. 52, s. 47.

(*y*) *Pennington, In re* (1889), 69 L. T. 774; *Colombine v. Penhall* (1853), 1 Sm. & Giff. 228; *Goldsmith v. Russell* (1855), 5 De G., M. & G. 547; *Fraser v. Thompson* (1859), 4 De G. & J. 659; *Bulmer v. Hunter* (1869), L. R., 8 Eq. 46. See, however, *Campion v. Cotton* (1810-11), 17 Ves. 264, 271; *Exp. McBurnie* (1852), 1 De G., M. & G. 441. As to effect of fraudulent settlement on order of discharge, see sect. 29, Bankruptcy Act, 1883.

(*z*) *Holland, In re*, (1902) 2 Ch. 360, C. A.

(*a*) *Lockyer v. Savage* (1733), 2 Str. 947. This was the first case in

which it was held that the fortune of the wife might be settled on the husband till his failure, and then to her separate use. The provision for the wife's maintenance was held good against creditors, as it was not a provision out of the bankrupt's estate, but a settlement out of the wife's own fortune. *Stephens v. James* (1831), 4 Sim. 499; *Lester v. Garland* (1832), 5 Sim. 205, 222; *Exp. Hinton* (1808), 14 Ves. 598; *Montefiore v. Behrens* (1865), L. R., 1 Eq. 171; and see *Re Pearson* (1876), 3 Ch. D. 807, where it was held that the insertion of a trust for the settlor for life determinable on bankruptcy rendered a post-nuptial settlement void under 13 Eliz. c. 5.

(*b*) *Green v. Spicer* (1830), 1 Russ.

Where the trustees of a settlement were directed to hold an estate in trust for the husband till he should become bankrupt or insolvent, and after his bankruptcy and the death of the wife, then during the remainder of his life upon trust to pay the rents for the maintenance and support or otherwise for the benefit of him and the issue, as they might think proper; it was held that the discretionary power of the trustees was not taken away by the bankruptcy, so as to enable the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were held entitled to the surplus (c).

But it seems now settled that, if there is an absolute discretion given to the trustees, that discretion will not be interfered with, and no part of the income can be claimed by the creditors (d).

In the case of *Montefiore v. Behrens* (e), where the wife became during the coverture absolutely entitled to a legacy of 500*l.*, and this sum was transferred to the trustees of the wife's settlement, under the trusts of which the husband took a life interest in it, determinable on bankruptcy; it was held that the limitation was valid (f).

With reference to what is meant by the term "insolvent," in a limitation of the kind now under consideration, where the income of settled property (not coming from the husband himself) is given to the husband "until he shall become bankrupt or insolvent"; it has been held, that where the word "insolvent" is used without a reference to the Insolvent Acts, it does not mean a technical insolvency, but a present inability to pay his debts, although, when all the assets are got in, the estate may ultimately prove solvent (g).

The execution of a composition deed which recites inability to

& Myl. 395; *Piercy v. Roberts* (1832), 1 Myl. & K. 4.

(c) *Wallace v. Anderson* (1853), 16 Beav. 533; and see *Rippon v. Norton* (1839), 2 Beav. 63; *Keursley v. Woodcock* (1843), 3 Hare, 185; *Page v. Way* (1840), 3 Beav. 20.

(d) *Holmes v. Penney* (1856), 3 K. & J. 90.

(e) (1865), L. R., 1 Eq. 171.

(f) Generally as to settlements void under the bankruptcy laws, see Williams on Bankruptcy, 8th ed., pp. 245 *et seq.*

(g) *De Tastet v. Le Tavernier* (1836), 1 Keen, 161. See also *Russell, Exp.* (1882), 19 Ch. D. 588.

What meant by insolvency.

Chap. X. s. 2 pay debts in full is "insolvency," upon which the gift over will take effect (*h*). And the execution of an inspectorship deed with a similar recital will have the same effect (*i*). It should be noted that, generally speaking, the date upon which the insolvent actually commits an act of bankruptcy, rather than that of the adjudication thereon, is the point of time upon which the gift over takes effect (*k*).

Montefiore v. Enthoven.

But where property was left by will to trustees, upon trust to pay the income of a daughter's share to her for life, and if she should leave a husband surviving, to him for life, or until he should become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, and after his decease or his bankruptcy, then over; and in the same will shares in reversionary property were given to sons, with a proviso that if, before their shares became payable, they should assign, charge, or otherwise dispose of the whole or any part thereof by way of anticipation, or become bankrupt, or take the benefit of any Act for the benefit of insolvent debtors, or do anything whereby such shares should become vested in some other person, they should go over; and the daughter married, and died leaving a husband, who executed an inspectorship deed under "The Bankruptcy Act, 1861"; it was held, that he had not brought himself within the clause of forfeiture, the meaning of which, as explained by the similar clause affecting the son's shares, was that such an act should be done as to cause a *cessio bonorum* (*l*).

Forfeiture may take place though interest not in possession.

The gift over on his insolvency or bankruptcy will take place, even though the husband's interest be not in possession (*m*).

Words of futurity relating to bankruptcy include a pending bankruptcy (*n*), but are not to be construed so as to defeat the manifest intention of the testator, by creating a forfeiture where no transfer of interest has taken place. Accordingly, where the

(*h*) *Re Muggeridge's Trusts* (1860), Johns. 625; and see Deeds of Arrangement Act, 1887, and rules under sect. 25 of the Bankruptcy Act, 1890.

(*i*) *Freeman v. Bowen* (1865), 35 Beav. 17.

(*k*) *Montefiore v. Guedalla*, (1901)

1 Ch. 435.

(*l*) *Montefiore v. Enthoven* (1867), L. R., 5 Eq. 35.

(*m*) *Sharp v. Cosserat* (1855), 20 Beav. 470.

(*n*) *Seymour v. Lucas* (1860), 1 Dr. & Sm. 177; *Manning v. Chambers* (1863), 1 De G. & Sm. 282.

bankruptcy had been annulled before the first receipt of money Chap. X. s. 2. under the gift, it was held that no forfeiture had occurred (*o*); but it has been more recently laid down that, in order to avoid a forfeiture, the bankruptcy or other act which would have that effect must have been annulled or undone before the period of distribution, and not merely before the first receipt of money (*p*).

But the property of the husband himself cannot be so settled as to divest on his bankruptcy (*q*). And it has been decided in an Irish case (*r*), that where a man settles his property so as to go over on his insolvency, and he executes an assignment in trust for his creditors, the event on which the gift over is to take place has occurred, but the gift over is void against the creditors (*s*).

Husband's property cannot be limited to divest on his bankruptcy.

However, where real estate was settled upon trust to pay the rents to the settlor for life, or until he should incur it, or become bankrupt, and then to pay an annuity to his wife, and he first mortgaged the property, and then became bankrupt, the limitation was upheld, as the forfeiture arose upon the previous mortgage, and it was held not necessary to consider the validity of the limitation with reference to the subsequent bankruptcy (*t*).

But limitation till he incur good.

Where, by mistake, the wife's property was made to appear to be the husband's, it was held that the settlement might be corrected, so as, conformably with the intention of the parties, to provide against the husband's bankruptcy or insolvency;

Settlement may be corrected where erroneous.

(*o*) *White v. Chitty* (1866), L. R., 1 Eq. 372; *Lloyd v. Lloyd* (1866), L. R., 2 Eq. 722; *Trappes v. Meredith* (1869-71), L. R., 9 Eq. 229; L. R., 7 Ch. 248; *Re Parnham's Trusts* (1872), L. R., 13 Eq. 413; *Ancona v. Waddell* (1878), 10 Ch. D. 157.

(*p*) *Samuel v. Samuel* (1879), 12 Ch. D. 152; and see *Hurst v. Hurst* (1883), 21 Ch. D. 278.

(*q*) *Higinbotham v. Holme* (1811), 19 Ves. 88; *Exp. Hodgson* (1812), 19 Ves. 206. "The husband's prop-

erty cannot be settled so as to make his life interest cease on bankruptcy, though his wife's may." Per Sir Lancelot Shadwell in *Lester v. Garland* (1832), 5 Sim. at p. 222.

(*r*) *Re Casey's Trust* (1855), 4 Ir. Ch. Rep. 247; Lewin, 11th ed. 115 (c).

(*s*) And see *Brewer's Settlement, In re*, (1896) 2 Ch. 503.

(*t*) *Brooke v. Pearson* (1859), 27 Beav. 181; and see *Knight v. Browne* (1861), 9 W. R. 515.

Chap. X. s. 2. and this although the settlement was complete and not executory (u).

No contrivance for evasion of the bankrupt laws sanctioned.

But no contrivance to evade the bankrupt laws will be sanctioned (x). Thus, a covenant by the husband in a settlement to pay a sum of money in the event only of his failing in his circumstances, will not, in the event of his bankruptcy, entitle the trustees to prove as creditors (y).

It has, however, been held that a marriage settlement of a settlor's own property, conditioned to himself for life or until bankruptcy, and after the determination of the trust in favour of the settlor by the happening of either event, upon trust to pay the income to his wife during life, was valid in the event of an involuntary alienation by process of law (z).

Holmes v. Penney.

In the case of *Holmes v. Penney* (a), it was held, that though a man's property cannot be settled on himself till bankruptcy or insolvency, it may be settled so as to give the trustees an absolute discretion to pay the income of it either to himself, his wife or children, and that such a limitation would be valid though the settlor became insolvent.

Lester v. Garland.

In *Lester v. Garland* (b), a trader received a fortune of 5,000*l.* with his wife. No part of this sum was settled; but the husband on his marriage settled a sum of stock (his own property) in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent. And it was provided, that if he should survive his wife, and the issue of the marriage should fail, and he should then be, or should have been, a bankrupt, 15-66ths of the stock should belong to the wife's next of kin in blood. Although the

(u) *Higginson v. Kelly* (1810), 1 Ball & B. 253; *Exp. Verner* (1810), 1 Ball & B. 260. As to a case in which a post-nuptial settlement by a husband, of property originally received by him from his wife, has been upheld, see *Mackintosh v. Pogose*, (1895) 1 Ch. 505.

(x) *Brewer's Settlement, In re, supra.*

(y) *Exp. Murphy* (1803), 1 Sch. & Lef. 44.

(z) *Detmold, In re* (1889), 40 Ch. D. 585; and see *Johnson-Johnson, In re*, (1904) 1 K. B. 134.

(a) (1856), 3 K. & J. 90; and see *Detmold, In re* (1889), 40 Ch. D. 585.

(b) (1832), 5 Sim. 205. See also *Exp. Hodgson* (1812), 19 Ves. 206; *Exp. Cooke* (1803), 8 Ves. 353.

settlement did not expressly state what was the consideration for this provision, Sir Lancelot Shadwell had no difficulty in holding that the limitation over on the bankruptcy was good to the extent of the 15-66ths, that being the proportion of the husband's stock which the wife's fortune would have purchased (c).

A forfeiture cannot be created by a mere attempt to do the thing interdicted; for "*non efficit conatus nisi sequitur effectus*" (d). Nor does the filing of a petition under which the petitioner is adjudicated bankrupt operate as a breach of a covenant in a lease not to assign (e).

Forfeiture not created by an attempt to do what is interdicted.

In *Jones v. Wyse* (f), the estate of the intended wife was vested upon trust to pay the rents and profits to the intended husband until he should become bankrupt, or insolvent, or until he should sell, alien, charge, or incumber the income, by way of anticipation, or should attempt, or agree so to do; and upon the occurrence of any one of these several contingencies, upon trust for children; and in default of issue, there was a gift over. No issue sprung from the marriage; and the wife died. In this situation the husband, who had got into difficulties, made sundry endeavours to raise money on the settled property, but abortively. The question was, whether he had thereby given effect to the forfeiture. Lord Langdale determined in the negative, holding that there was nothing to preclude the husband from taking legal advice to ascertain what his powers were; and that he might do acts indicative of his wishes on the subject, without

Jones v. Wyse.

(c) And see *Mackintosh v. Pogose*, (1895) 1 Ch. 505. As to what words denote an intention that the interest of a man shall cease, or be divested on bankruptcy or insolvency, see *Dommet v. Bedford* (1796), 3 Ves. 149; *Doe v. Carter* (1799), 8 D. & E. (Term Reps.) 300; *Wilkinson v. Wilkinson* (1815), Coop. 259; *The King v. Robinson* (1811), Wight. 386; *Shee v. Hale*, 13 Ves. 404; *Cooper v. Wyatt* (1821), 5 Mad. 482; *Yarnold v. Moorhouse* (1830), 1 Russ. & M. 364; *Lear v. Leggett* (1829), 2 Sim. 479; *Golden v. Crowhurst*

(1842), 10 Sim. 642; *Montefiore v. Enthoven* (1867), L. R., 5 Eq. 35.

(d) *Sir A. Mildmay's case* (1606), 6 Co. 42 b. See also *Pierce v. Win* (1678), 1 Vent. 321; *Foy v. Hynde* (1625), Cro. Jac. 697; and the argument in *Stephens v. James* (1831), 4 Sim. 499, at p. 504.

(e) *Riggs, In re*, (1901) 2 K. B. 16.

(f) (1838), 2 Keen, 285; and see also *Graham v. Lee* (1857), 23 Beav. 388; *Re Stulz's Trusts* (1853), 4 De G., M. & G. 404.

Chap. X. s. 2. exposing himself to the penalties of the settlement. Where, however, the intention results in some overt act, such as an actual petition and subsequent adjudication in bankruptcy, the overt act constitutes an alienation within the meaning of the gift over (*g*).

Operation of
27 Eliz. c. 4,
s. 5.

The 27 Eliz. c. 4, contains a provision which must be attended to, where *land* is proposed to be put in settlement. This statute enacts that every conveyance of lands, tenements or other hereditaments made for the intent and of purpose to defraud and deceive purchasers, shall be deemed and taken as against such purchasers only, to be utterly void, frustrate and of none effect; and also that every conveyance containing a clause of revocation or alteration shall be in like manner void as against subsequent purchasers for valuable consideration. It is now, however, provided by the Voluntary Conveyances Act, 1893 (*h*), that, subject to the savings in section 3, "no voluntary conveyance of any lands, tenements or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding." On the construction of the statute of Elizabeth, it has not only been decided that a voluntary conveyance is to be considered as fraudulent within the meaning of the Act (*i*), but that even the consideration of marriage in an ante-nuptial settlement would not, if there were an actual fraudulent intent, protect the deed (*k*). The statute, however, does not extend to

Voluntary
Conveyances
Act, 1893.

(*g*) *Cotgrave, In re*, (1903) 2 Ch. 705.

(*h*) 56 & 57 Vict. c. 21, s. 2.

(*i*) *Doe d. Otley v. Manning* (1807), 9 East, 59, and cases collected in Sugden, V. & P. p. 714, 14th ed. See *post*, p. 316, where the effect of this statute is more fully discussed. See also *Dolphin v. Aylward* (1870), L. R., 4 H. L. 486.

(*k*) *St. Saviour's case* (1606-7), Lane, 21, 22. The words of the resolution are, that "though the consideration of marriage be a good consideration, yet if a power of revocation be annexed to the deed, it is void as unto *strangers*"; and see *Tarback v. Marbury* (1705), 2 Ver. 510; *Cross v. Faustenditch* (1605), Cro. Jac. 180; and even though

cases of personal estate (*l*); nor does it extend to particular powers, such as a power to charge a reasonable sum on a valuable estate (*m*). Chap. X. s. 2.

It has been already considered (*n*) in what cases the Court will rectify post-nuptial settlements based upon articles entered into before marriage. It requires a somewhat stronger case to enable the Court to interfere when the settlement, whether in pursuance of articles or not, has been executed before the marriage. There are, however, two grounds which confer this jurisdiction, viz., mistake and fraud. When Court will rectify settlements.

(1) Mistake. The mistake must, in general, be common to both parties (*o*); but it seems that if they can be replaced in their original positions, this rule does not apply (*p*). And an ante-nuptial settlement, made under protest by one of the parties, will not, subsequently to the marriage, be rectified (*q*). If it can be shown that the deed does not contain what the parties have agreed upon, the settlement will be rectified (*r*); and if mistake be proved, a settlement will be reformed even after a long lapse of time (*s*). And it has been directed to be reformed in the case of a ward of Court, who waited till her majority, and married with a settlement which did not meet the approval of the Court (*t*). The usual practice is to direct the On ground of mistake.

the husband had released his power before he made the subsequent sale; *v. Duffield* (1876), L. R., 20 Eq. 789; 2 Ch. D. 44.
3 Rep. 83; *Bullock v. Thorne* (1599), Moo. 615; and see Sug. on Pow., 8th edit. 642.

(*l*) As to who are entitled to claim the benefit of this statute, see Sug. on Pow., 8th edit. p. 646.

(*m*) *Jenkins v. Keymis* (1665), 1 Lev. 150.

(*n*) *Ante*, Chap. X. s. 1.

(*o*) *Tucker v. Bennett* (1887), 38 Ch. D. 1; *Sells v. Sells* (1860), 1 Dr. & Sm. 42; *Rooke v. Lord Kensington* (1856), 2 K. & J. 753; *Murray v. Parker* (1854), 19 Beav. 305; *Earl of Bradford v. Earl of Romney* (1862), 30 Beav. 431; *Cogan*

(*p*) *Harris v. Peppercell* (1867), L. R., 5 Eq. 1.

(*q*) *Eaton v. Bennett* (1865), 34 Beav. 196.

(*r*) *Pearce v. Verbeke* (1840), 2 Beav. 333; *Marq. of Exeter v. Marchioness of Exeter* (1838), 3 Myl. & Cr. 321; *Stock v. Vining* (1858), 25 Beav. 235; *Torre v. Torre* (1853), 1 Sm. & G. 518; *Re De la Touche's Settlement* (1870), L. R., 10 Eq. 599; *Lackersteen v. Lackersteen* (1861), 30 L. J., Ch. 5.

(*s*) *Wolterbeek v. Barrow* (1857), 23 Beav. 423.

(*t*) *Money v. Money* (1855), 3 Drew. 256.

Chap. X. s. 2. decree or declaration varying the settlement to be indorsed upon it; but in one case (*u*) a reconveyance was directed.

In *Re Bird's Trusts* (*x*), it was held that the Court had jurisdiction upon a petition under the Trustee Relief Act to rectify the settlement, by inserting the word "heirs." In a previous case (*y*), the Court did not direct the settlement to be rectified, but prefaced the order with a declaration that it appeared that the words in question had been inserted by mistake, and thereupon made an order for distribution of the fund as if the clause had not been inserted.

Where the husband alleged that the settlement was contrary to the agreement, but he knew its contents before executing it, which he did under protest, it was held he could not after marriage maintain a suit to rectify it (*z*).

Evidence.

Rectification may be ordered upon parol evidence (*a*), and, after the death of the husband, on the uncontradicted evidence of the wife (*b*); but evidence of intention must be very clear and distinct (*c*).

On ground
of fraud.

(2) Fraud. In *Harbidge v. Wogan* (*d*), it was alleged that a general power of appointment by the wife had been fraudulently omitted from the settlement: it was not proved that the instructions referred to such a power, nor that it was omitted by fraud; but it was shown that the power was inserted in the draft settlement and in the agreement; and an issue was directed whether the wife knew, when she executed the deed, that the power in question was not in it.

In *Clark v. Girdwood* (*e*), a widow, with children, entrusted

(*u*) *Mulmesbury v. Mulmesbury* (1862), 31 Beav. 407; and see Form 3A in Seton on Decrees, 6th ed., p. 1708.

(*x*) (1876), 3 Ch. D. 214; and see *Fitzgerald v. Fitzgerald*, (1902) 1 Ir. R. 477, C. A.

(*y*) *Re De la Touche's Settlement* (1870), L. R., 10 Eq. 599.

(*z*) *Eaton v. Bennett* (1865), 34 Beav. 196.

(*a*) *Lackersteen v. Lackersteen* (1861), 30 L. J., Ch. 5.

(*b*) *Smith v. Iliffe* (1875), L. R., 20 Eq. 666; *Cooke v. Fearn* (1879), 27 W. R. 212; *Hanley v. Pearson* (1879), 13 Ch. D. 545; *Lovesy v. Smith* (1880), 15 Ch. D. 655.

(*c*) *Bonhote v. Henderson*, (1895) 1 Ch. 742; *S. C.*, (1895) 2 Ch. 202, C. A.

(*d*) (1846), 5 Hare, 258.

(*e*) (1877), 7 Ch. D. 9; see also *Lovesy v. Smith* (1880), 15 Ch. D. 655.

her intended husband with the preparation of a settlement upon their marriage, and it was decided that he, having undertaken as agent of the wife to have a settlement prepared, was bound to have such a contract prepared as the Court would sanction, and accordingly the settlement was rectified so as to give the wife the first life interest in her own property. It was also held by the Court of Appeal that, as the solicitor had not participated in the fraud, there was no jurisdiction to make him pay the costs of the suit (*f*).

A barrister engaging to settle his wife's property is bound to make such a settlement as a conveyancer would draw or the Court sanction (*g*).

(*f*) Generally as to the principles upon which rectification of deeds will be decreed, see *Willis v. Barron*, (1902) A. C. 271.

(*g*) *Corley v. Lord Stafford* (1857),

1 De G. & J. 238; and see *Clark v. Girdwood* (1877), 7 Ch. D. 9; *Lovesy v. Smith* (1880), 15 Ch. D. 635.

SECTION III.

POST-NUPTIAL SETTLEMENTS.

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In post-nuptial settlements, the marriage consideration is wanting.

Where the settlement is post-nuptial, all those weighty and important considerations which spring from the independent position of the parties before matrimony, and from their altered state after it, are wanting. The husband and wife were formerly incapable of contracting with each other because the wife was under the disability of coverture (*h*); and because her

(*h*) "What I go upon is this, that here was no contract on the part of the wife. She was incapable of contracting, being under coverture."

Per Lord Hardwicke in *Lanoy v. Duchess of Athol* (1742), 2 Atk. 444, 448.

personality was merged in that of her husband. In equity, however, a wife might validly have contracted with her husband as to property limited to her separate use, or which she had power to dispose of independently of him. And now, by the Married Women's Property Act, 1882 (*i*), the doctrine of equity has received statutory recognition. Though in general post-nuptial settlements will for want of consideration be deemed voluntary, yet as articles entered into before marriage are founded upon valuable consideration, post-nuptial settlements made in pursuance of ante-nuptial articles will be held to be made on the valuable consideration of the articles; and this in one instance was decreed to be the case though the settlement made no mention of the previous agreement (*k*). A settlement, however, not in accordance with the articles is voluntary, though only so far as it differs from them (*l*).

Chap. X. s. 3.

Consideration valuable when in pursuance of articles.

It has been held that a parol agreement before marriage will not support a post-nuptial settlement (*m*), for the Statute of Frauds expressly enacts that all agreements made in consideration of marriage shall be in writing; and the marriage itself is, of course, no such part performance as to take the case out of the statute (*n*). But in a recent case (*o*), it was decided by the Court of Appeal that the recital of the ante-nuptial parol agreement, in the post-nuptial settlement modelled thereon (when coupled with the good consideration of the marriage), was sufficient to satisfy the Statute of Frauds, and was valid against creditors. There may be, moreover, acts of part performance independent of the marriage—such as the delivery of possession of land—the effect of which would be to validate the ante-nuptial parol agreement (*p*). A recital of an ante-nuptial

Parol agreement before marriage.

(*i*) 45 & 46 Vict. c. 75.

(*k*) *Ferrars v. Cherry* (1700), 2 Vern. 383.

(*l*) *Jason v. Jervis* (1684), 1 Vern. 284; *Gates v. Fabian* (1870), 19 W. R. 61.

(*m*) *Goldicutt v. Townsend* (1860), 28 Beav. 445.

(*n*) *Lassence v. Tierney* (1849), 1 M. & G. 551; *Caton v. Caton* (1867),

L. R., 1 Ch. 137; 2 H. L. 127.

(*o*) *Holland, In re*, (1902) 2 Ch. 360; but see *Battersbee v. Farrington* (1818), 1 Sw. 106.

(*p*) *Surcome v. Pinniger* (1853), 3 De G., M. & G. 571; *Ungley v. Ungley* (1876-7), 4 Ch. D. 73; 5 Ch. D. 887. See also *Williams v. Walker* (1882), 9 Q. B. D. 576, when it was held that a parol post-nuptial con-

Chap. X. s. 3. agreement in a post-nuptial settlement "cannot, as against any person not a party to it, alter the consideration or the true character of the deed, or supply the want of other evidence of a binding ante-nuptial contract: but I apprehend it is good evidence as between the parties, at all events, of the terms of and the considerations for their agreement *inter se*" (q). But where money has been transferred to trustees on trusts agreed on by parol only, and the settlement declaring the trusts and reciting the agreement is executed after the marriage, a perfectly valid consideration is given to the settlement (r).

Valuable consideration may move from third parties;

A post-nuptial settlement is often rendered unimpeachable by a valuable consideration moving from third parties. Thus, in *Wheeler v. Caryl* (s), Lord Hardwicke said, "If after marriage the father of the wife or other person, in consideration of the husband's making a settlement, advance a sum of money, such a settlement will be good and for valuable consideration" (t). And though the money be not paid at the time, yet if it be sufficiently secured the settlement will stand (u). And if a third party agree to advance money to pay the husband's debts on condition of his settling his property for the benefit of his family, such post-nuptial settlement has been held good against creditors, even though one debt be concealed by the settlor, and therefore not satisfied in accordance with the agreement (x). And where the estate of the bankrupt has had the benefit of an advance, a settlement, assuring the repayment of the same, is *pro tanto* for valuable consideration (y).

tract between husband and wife as to the real estate of the latter, not being her separate property, could not be perfected by part performance.

(q) Per Lord Selborne, L. C., in *Codrington v. Lindsay* (1872), L. R., 8 Ch. at p. 588; but see *Holland, In re*, (1902) 2 Ch. 360.

(r) *Cooper v. Wormald* (1859), 27 Beav. 266.

(s) (1751), Amb. vol. 1, 121.

(t) See *Thompson v. Webster*

(1859), 4 Drew. 628, 632; 4 De G. & J. 600.

(u) *Wheeler v. Caryl* (1751), *ubi sup.*

(x) *Holmes v. Penney* (1856), 3 K. & J. 90; *Ford v. Stuart* (1852), 15 Beav. 493; see also *Bayspoole v. Collins* (1871), L. R., 6 Ch. 228; and *Pott v. Todhunter* (1845), 2 Coll. 76, though there the settled property was never actually in the power of the husband.

(y) *Naylor, In re* (1893), 62 L. J., Q. B. 460.

So likewise the consideration may be the relinquishment of any valuable interest by the wife, as in *Cottle v. Fripp* (z), where she relinquished her jointure by fine in consideration of a provision, which, though post-nuptial, was held entitled to precedence over the husband's creditors. Or if the wife give up a former settlement made in consideration of marriage, or if she give her separate property to the husband, or charge it for him, in consideration of a post-nuptial settlement, such settlement will be good against creditors and purchasers (a). And upon the same principle the modification by the husband of his life estate in possession and by the wife of her inheritance forms a good and valuable consideration for a post-nuptial settlement (b).

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or by the wife relinquishing some interest.

So likewise a purchase of property, in the name of the husband, out of separate moneys belonging to the wife, creates a resulting trust for the wife, which will prevail against the creditors of the husband (c).

The murder of a settlor by a *cestui que trust* creates a resulting trust for the estate of the settlor (d).

The absence of any statement of consideration in the settlement itself is not conclusive as to its voluntary character, for it may be so connected with other transactions as to derive efficacy from them; and evidence of surrounding circumstances is admissible to show this connexion (e). A deed of settlement in

Though not stated may be proved.

(z) (1691), 2 Vern. 220. See also *Lavender v. Blakstone* (1676), 2 Lev. 147; and *Acraman v. Corbett* (1861), 1 J. & H. 410.

(a) *Scot v. Bell* (1673), 2 Lev. 70; *Arundell v. Phipps* (1804), 10 Ves. 140; *Curter v. Hind* (1853), 2 W. R. 27; *Whithread v. Smith* (1854), 3 De G., M. & G. 727, 739; see also *Harman v. Richards* (1852), 10 Hare, 81.

(b) *Hewison v. Negus* (1853), 16 Beav. 594, affirmed 17 Jur. 567. See also *Teasdale v. Braithwaite* (1876 and 1877), 4 Ch. D. 85; 5 Ch. D. 630; *Re Foster and Lister* (1877), 6 Ch. D. 87; *Shurmur v. Sedgwick* (1883), 24 Ch. D. 597.

(c) *Mercier v. Mercier*, (1903) 2 Ch. 98, C. A.

(d) *Cleaver v. Mutual Reserve Fund Life Association*, (1892) 1 Q. B. 147, C. A.

(e) "If," says Lord Hardwicke, "there is a voluntary conveyance of real estate, or chattel interest, by one not indebted at the time, although he afterward becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void;

Chap. X. s. 3. form voluntary may be shown by extrinsic evidence to have been in fact made for valuable consideration (*f*). When the deed was expressed to be made in consideration of five shillings, "and divers other good and valuable considerations," but no evidence was adduced as to any other consideration than what appeared from the language of the deed itself, the Court directed an inquiry whether the settlement was founded upon any and what valuable consideration (*g*). It should also be borne in mind that a settlement voluntary in its inception may by subsequent dealings for value be rendered unimpeachable (*h*). And a gift of money to be employed by the donee in a business, or in the acquirement of a business, the business itself not being settled, or the moneys earmarked, is not a settlement within the meaning of sect. 47 of the Bankruptcy Act, 1883, which can be avoided by the subsequent bankruptcy of the donor (*i*).

13 Eliz. c. 5. It is now proposed to consider some of the decisions pronounced on the 13 Eliz. c. 5, which enacts that all conveyances of lands, tenements, hereditaments, goods and chattels, devised and contrived to delay, hinder or defraud creditors, shall as against such creditors be utterly void. The statute, however, contains a saving clause in favour of persons taking any estate or interest upon good consideration, and *bonâ fide* without notice of the fraud.

Settlement
for value void
if made with
intent to
defraud.

It is clear that a settlement for valuable consideration made with the intention of defrauding creditors is void under this statute (*k*). But in the words of Sir G. Turner, "those who

otherwise not, but it will stand, though afterwards he becomes indebted. . . . A man actually indebted and conveying voluntarily always means to be in fraud of creditors, as I take it": *Townshend v. Windham* (1750), 2 Ves. sen. 1, pp. 10, 11. See also *Battersbee v. Farringdon* (1818), 1 Swanst. 106; *Russell v. Hammond* (1738), 1 Atk. 13; *Harman v. Richards* (1852), 10 Hare, 81.

(*f*) *Pott v. Todhunter* (1845), 2 Coll. 76. See also *Clifford v. Turrell*

(1841), 1 Y. & C. C. C. 138; *Townend v. Toker* (1866), L. R., 1 Ch. 446, 459; *Bayspoole v. Collins* (1871), L. R., 6 Ch. 228.

(*g*) *Kelson v. Kelson* (1853), 10 Hare, 385.

(*h*) *George v. Milbanke* (1803), 9 Ves. 190.

(*i*) *Plummer, In re*, (1900) 2 Q. B. 790.

(*k*) *Pennington, In re* (1889), 59 L. T. 774; *Colombine v. Penhall* (1853), 1 Sm. & G. 228; *Bulmer v. Hunter* (1869), L. R., 8 Eq. 46;

undertake to impeach for *mala fides* a deed which has been executed for valuable consideration have a task of great difficulty to discharge" (l). On the other hand, the mere fact of a settlement being voluntary is not sufficient to render it void as against creditors (m), especially if the settlor was solvent at the time of making the settlement, or, though indebted, had ample assets to cover such indebtedness (n). There must be in all cases a fraudulent intention, though, as we shall see, this intention is lightly attributed in the absence of any valuable consideration. And if a settlor be in embarrassed circumstances, the meritorious object of providing for wife or child will not validate a voluntary deed executed by him (o).

This fraudulent intention may be apparent on the face of the deed (p), or it may be presumed from all the circumstances of the case (q). Thus, the reservation to the settlor of a life estate determinable on bankruptcy (r), the fact that the trusts are revocable at the request of the settlor, with the consent of the trustees (s), the fact that he was engaged (t), or about to engage (u), in speculative transactions, and the retention of the deed by the settlor, coupled with a power to mortgage the estate (x), have been held sufficient to indicate a fraudulent

Fraudulent
intention.

Middleton v. Pollock (1876), 2 Ch. D. 104.

(l) *Harman v. Richards* (1852), 10 Hare, 81, 89. See also *Copis v. Middleton* (1817), 2 Madd. 410; *Re Johnson* (1881), 20 Ch. D. 389; *Re Eyre*, W. N. 1881, p. 116.

(m) *Holmes v. Penney* (1856), 3 K. & J. 90.

(n) *Holland, In re*, (1902) 2 Ch. 360, C. A.; *Lane Fox, In re*, (1900) 2 Q. B. 508, C. A.; *Kent v. Riley* (1872), L. R., 14 Eq. 190.

(o) *Parry, In re*, (1904) 1 K. B. 129; *Barrack v. M'Culloch* (1856), 3 Kay & J. 110.

(p) *Spirett v. Willows* (1863), 3 De G., J. & S. 293; *Re Pearson* (1876), 3 Ch. D. 807.

(q) *Twyne's case* (1601), 3 Rep.

80, b. A voluntary settlement executed with the intention of defeating a sequestration was set aside as fraudulent in *Blenkinsopp v. Blenkinsopp* (1849), 12 Beav. 568; 1 De G., M. & G. 495.

(r) *Re Pearson* (1876), 3 Ch. D. 807.

(s) *Parry, In re*, (1904) 1 K. B. 129.

(t) *Crossley v. Elworthy* (1871), L. R., 12 Eq. 158.

(u) *Mackay v. Douglas* (1872), L. R., 14 Eq. 106; *Exp. Russell* (1882), 19 Ch. D. 588; and see *Ridler, In re* (1882), 22 Ch. D. 74.

(x) *Tarback v. Marbury* (1705), 2 Vern. 510. See also *Jenkyn v. Vaughan* (1856), 3 Drew. 419. Where the settlor continues in pos-

Chap. X. s. 3. intention. The cases, however, which have most frequently called for the interference of the Court have been those in which the settlor was indebted at the date of the settlement; and these we must distinguish, not only according to the degree of the settlor's indebtedness, but also with reference to the classes of creditors who seek to remove the settlement out of their way.

Insolvency of settlor.

If the settlor is actually insolvent at the date of the settlement, he has in fact no property which he has a right to settle; and, quite independently of the question how far the then existing creditors have been prejudiced, the settlement under those circumstances will be set aside as fraudulent (*y*), and "if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent" (*z*). When the settlor is proved to be insolvent shortly after the execution of the settlement, the onus is thrown upon him of establishing his solvency at the date of the settlement (*a*). In estimating the solvency or insolvency of the settlor at the time of making the deed, the value of the life interest of the settlor taken thereunder should be included (*b*).

Result of authorities.

In *Holmes v. Penney* (*c*), Sir W. Page Wood, V.-C., stated the result of the authorities to be that—

"The settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the Court to believe that the inten-

sion of the property, and such possession is not justified by the terms of the deed, it throws doubt upon the *bona fides* of the transaction (*Twyne's case* (1601), 3 Rep. 80; *Ryall v. Rolle* (1749), 1 Atk. 165; 1 Ves. sen. 348; *Stileman v. Ashdown* (1742), 2 Atk. 478); but is not of itself conclusive evidence of a fraudulent intention: *Alton v. Harrison* (1869), L. R., 4 Ch. 622.

(*y*) *Mouat, In re*, (1899) 1 Ch. 831; *Crossley v. Elworthy* (1871), L. R., 12 Eq. 158; *Mackay v.*

Douglas (1872), L. R., 14 Eq. 106; *Taylor v. Coenen* (1876), 1 Ch. D. 636.

(*z*) Per Sir G. M. Giffard, L. J., in *Freeman v. Pope* (1870), L. R., 5 Ch. 545.

(*a*) *Crossley v. Elworthy* (1871), *supra*.

(*b*) *Lowndes, In re* (1887), 18 Q. B. D. 677.

(*c*) (1856), 3 K. & J. at p. 99. In *Lush v. Wilkinson* (1800), 5 Ves. 387, Lord Alvanley said the question must depend on whether

tion of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were creditors of the settlor. The mere fact of a man's making a voluntary settlement, and thereby parting with a large portion of his property, has never been held to make such a settlement fraudulent as against subsequent creditors" (d). Chap. X. s. 3.

Although the settlor is indebted at the date of the settlement, yet, if the debt is secured by a sufficient mortgage, it is clear that such a debt would not be evidence of fraud, and consequently would not invalidate the settlement (e).

A similar remark applies, where the settlement itself actually provides for the payment of the debts (f); and, subject to the law of bankruptcy, there is nothing to prevent a debtor from settling the whole of his property upon one or more favoured creditors (g). In a recent case (h) it has been held that "a deed of arrangement, which is intended to give effect to a *bonâ fide* scheme of arrangement for their benefit, is not void under 13 Eliz. c. 5, as tending to delay creditors, merely because it reserves a benefit to the debtor, or because some of the creditors are intentionally excluded from its operation." When the deed provides for payment of settlor's debts.

the settlor was in insolvent circumstances at the time; but in *Richardson v. Smallwood* (1822), Jac. 552, Sir T. Plumer held that it was not necessary to prove insolvency, if the settlor was largely indebted, the question being the intention to defraud creditors. See also *Kidney v. Coussmaker* (1806), 12 Ves. 136; *Townsend v. Westacott* (1840), 2 Beav. 340; *Skarf v. Soulby* (1849), 1 Mac. & G. 364; *Kent v. Riley* (1872), L. R., 14 Eq. 190.

(d) And see *Plummer, In re*, (1900), 2 Q. B. 790.

(e) *Stephens v. Olive* (1786), 2 Bro. C. C. 90; *Lush v. Wilkinson* (1800), 5 Ves. 384; and see *Ware v. Gardner* (1869), L. R., 7 Eq. 317.

(f) *Tetley, In re* (1896), 66 L. J., Q. B. 111; *George v. Milbanke* (1803), 9 Ves. 190; *Nunn v. Wills-*

more (1800), 8 Term Rep. 521. See *Holmes v. Penney* (1856), 3 K. & J. 90; *Re Johnson* (1881), 20 Ch. D. 389.

(g) *Sharp v. Jackson*, (1899) A. C. 419; *Alton v. Harrison* (1867), L. R., 4 Ch. 622; *Allen v. Bonnett* (1868), L. R., 5 Ch. 577; *Exp. Games* (1879), 12 Ch. D. 314; *Spencer v. Slater* (1878), 4 Q. B. D. 13; *Boldero v. London and Westminster Discount Co.* (1879), 5 Ex. D. 47.

(h) *Maskelyne & Cooke v. Smith*, (1903) 1 K. B. 671, C. A. Where, however, a debtor, deeming it a hardship upon a particular class of creditors to leave them to their right to prove in ordinary course, pays them in full, upon the eve of bankruptcy, such payment constitutes a fraudulent preference: *Blackburn, In re*, (1899) 2 Ch. 725.

Chap. X. s. 3. But it is not necessary that the debts should be absolutely due at the time of executing the settlement, or even that they should be certain; for it has been decided that the deed may be displaced by evidence of debts that were merely contingent (*i*).

Not necessary that debts should be actually due.
Post obit covenant.

A post obit covenant in a marriage settlement may be sufficient to bring the case within the statute (*k*). Thus in the case of *Mathews v. Feaver* (*l*), a man having property worth 1,000*l.*, but owing 300*l.*, made a voluntary settlement of all his property, which rendered him incapable of paying his debts, and it was consequently held a fraud under the statute. And where a trader by a post-nuptial settlement settled the whole of his property, both present and future, and became bankrupt five years later, it was held that it was void against his assignees, as having been made with intent to defraud, though it did not appear that he was indebted at the time of its execution, except on mortgages of part of the settled property which had since been satisfied (*m*).

In view of the ruling of the Court in the recent case of *Lane-Fox, In re* (*n*), the above decision must, however, be regarded as constituting the extreme limit to which this rule will, at the present day, be extended.

Case of *Spirett v. Willows*.

In the case of *Spirett v. Willows* (*o*), it was said by Lord Westbury that if the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. This dictum, however, has been strongly disapproved

(*i*) In *Rider v. Kidder* (1805), 10 Ves. 360, a husband by an ante-nuptial settlement covenanted for payment to his wife of 3,000*l.*, if she survived him. During the coverture he made a voluntary settlement upon another woman. He afterwards died. Lord Eldon held, that the voluntary settlement was a fraud upon the widow. See 1 Rep. 316.

(*k*) *Mathews v. Feaver* (1786), 1 Cox, 278; and see *Adames v. Hallitt* (1868), L. R., 6 Eq. 468.

(*l*) (1786), 1 Cox, 278; and see *Walker v. Burrowes* (1745), 1 Atk. 93.

(*m*) *Ware v. Gardner* (1869), L. R., 7 Eq. 317.

(*n*) (1900) 2 Q. B. 508.

(*o*) (1863), 3 De G., J. & S. 293, 302.

of (*p*), and it manifestly substitutes for the fraudulent intention Chap. X. s. 3. required by the statute to invalidate the settlement, the question whether the creditor was in fact prejudiced thereby.

Sir W. M. James, V.-C., has pointed out (*q*) the injustice and absurdity which would result from the rigid application of this doctrine.

"If," he says, "in the result, from some accident, a small debt remained unpaid for some years, and, by reason of a voluntary settlement and subsequent insolvency of the debtor, the creditor was delayed in the payment of his debt, then, however honest the settlement was, however solvent the settlor was at the time, if at the time he had 100,000*l.* and put 100*l.* in the settlement, and a creditor for 10*l.* happened to be unpaid in consequence of the settlor losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement."

The actual decision in *Spirett v. Willows* was fully justified by the fraudulent intention which undoubtedly in that case furnished the motive of the settlement; and the remarks of the Lord Chancellor which have been cited were extra-judicial. They conflict with the previous cases which decided that the mere existence of a debt at the time of the settlement would not render it invalid; and it is submitted that *Spirett v. Willows* will not be followed so far as it lays down that mere indebtedness, as distinguished from substantial insolvency, will invalidate a voluntary settlement (*r*).

We have now to consider what creditors are entitled to impeach the settlement, and on this subject Sir William Grant, in *Kidney v. Coussmaker* (*s*), observed that: "Although there has been much controversy, and a variety of decisions upon the question whether such a deed be fraudulent as to any creditors except such as were creditors at the time, I am disposed to follow the decision in *Montague v. Lord Sandwich* (*t*), which is that the settlement is fraudulent *only* as against such creditors as were creditors at the time."

What creditors may impeach the deed.

(*p*) See *Freeman v. Pope* (1870 and 1877), L. R., 9 Eq. 206; *ibid.* 5 Ch. 538; *Re Johnson* (1881), 20 Ch. D. 389.

(*q*) *Freeman v. Pope* (1870), L. R.,

9 Eq. at p. 211.

(*r*) And see *Lane-Fox, In re, supra.*

(*s*) (1806), 12 Ves. 136.

(*t*) (1806), *ibid.* 148.

Chap. X. s. 3.

But a voluntary settlement may be set aside under the statute, upon evidence of fraudulent intent, although there were no debts at the time of its execution. And this was held by Lord Hardwicke in *Stileman v. Ashdown* (u). Evidence of intention to defraud is, however, essential. Where, therefore, there is no intention to defeat and delay creditors, the statute of 13 Eliz. does not apply (x). It is clear, however, that upon whatever ground the deed is invalidated, the property embraced by it is thrown open to the creditors at large, subsequent as well as prior (y).

Intention of
defeating
subsequent
creditors.

When none of the creditors in existence at the date of the settlement remain unpaid, a strong case is required to establish a fraudulent intention of defeating subsequent creditors; and it seems to be now settled that the presumption of fraud is rebutted by payment of all the existing debts. Cases may, of course, arise in which the circumstances amount to a fraud on subsequent, as well as existing, creditors, and then all the creditors have an equal equity to impeach the deed; but in the common case of a voluntary settlement, and a changing body of creditors, the right of a subsequent creditor is made to depend upon this, viz.: whether a single creditor whose debt was due at the date of the settlement still remains unpaid.

(u) (1742), 2 Atk. 478; and see *Ware v. Gardner* (1869), L. R., 7 Eq. 317, where the only debts were mortgage debts; and *Freeman v. Pope* (1869), L. R., 9 Eq. 206; L. R., 5 Ch. App. 538; *Taylor v. Coenen* (1876), 1 Ch. D. 636.

(x) *Tetley, In re* (1896), 66 L. J., Q. B. D. 111.

(y) *Jenkyn v. Vaughan* (1856), 3 Drew. 419; *Townshend v. Windham* (1750), 2 Ves. sen. 1, 11; *Strong v. Strong* (1854), 18 Beav. 408. A case of policies of assurance, which, since 1 & 2 Vict. c. 110, are held within the 13 Eliz. c. 5: *Walker v. Burrowes* (1745), 1 Atk. 93; *Taylor v. Jones* (1743), 2 Atk. 600; *Richardson v. Smallwood* (1822), Jacob,

522, where Sir Thomas Plumer said: "Suppose a person indebted, to execute a conveyance, which, against such creditors as were creditors at the time, would be void: then, if they are paid, and a new set of creditors stand in their places, does that make any difference?" And a deed having for its object to defeat future creditors is void under the Act, as in *Barling v. Bishopp* (1860), 29 Beav. 417, where, after notice of trial in an action, the defendant executed a voluntary conveyance to his daughter, and took the benefit of the Insolvent Debtors Act, the conveyance was held void, as being intended to defeat the plaintiff in the action.

In *Jenkyn v. Vaughan* (z) the position of subsequent creditors Chap. X. s. 3. was fully discussed, and V.-C. Kindersley's judgment, from which the following extracts are taken, places the matter on a satisfactory basis:—

"It is not in dispute that a subsequent creditor is entitled to participate, if the instrument is set aside by any creditor; and I am not aware that in that case there is any distinction between the two classes of creditors, those who were so before and those who became so after the deed. I believe they all participate *pro rata*. It is clear, therefore, that a subsequent creditor has an equity to some extent, viz., a right to participate in the division of the property if the settlement is set aside.

"In cases where a subsequent creditor files a bill, it occurs to me that much may depend on this (supposing there is no evidence of anything to show the fraudulent intention but the fact of the settlor being indebted to some extent),—whether, at the time of filing the bill, any of the debts remain due which were due when the deed was executed. In such a case, as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too; but if at the time of filing the bill no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill, unless there were some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. But it appears to me, in the absence of authority to the contrary, that a subsequent creditor may file a bill, if any debt due at the date of the deed remains due at the time of filing the bill" (a).

Moreover, as the right of the creditor is a legal one, mere delay to take proceedings, if not sufficient to bar the debt, is no defence (b).

It has been decided that a creditor under a voluntary *post obit* bond is as much entitled to the benefit of the statute as any other creditor (c). Voluntary creditor.

Since every kind of property can now be made available for the satisfaction of the claims of creditors, the distinctions which prevailed before the passing of 1 & 2 Vict. c. 110, as to property which could, and that which could not, be taken in execution, are no longer of importance. It is clear that now a settlement All property available for creditors.

(z) (1856), 3 Drew. 419.

(b) *Madderer, In re* (1883), 27 Ch. D. 523, C. A.

(a) And see *Freeman v. Pope* (1870), L. R., 5 Ch. App. 538.

(c) *Adames v. Hallett* (1868), L. R., 6 Eq. 468.

Chap. X. s. 3. of stock (*d*), or policies of assurance (*e*), or a purchase in the name of another (*f*), may be set aside under the statute. Under the Bankruptcy Act, 1883 (*g*), gifts of personal property, such as jewellery and furniture, made by a bankrupt within two years of his bankruptcy, without restricting the donee's power of alienation, but with intention that the donee should use or retain the property for an indeterminate time, are voluntary settlements within the meaning of sect. 47, and as such are void against the trustee in bankruptcy (*h*).

How creditor
may impeach
settlement.

A creditor who seeks to impeach a settlement under the statute should sue on behalf of himself and all other creditors (*i*); but the plaintiff need not obtain a charging order (*k*), nor recover judgment (*l*) before commencing his action. No delay short of the statutory period of limitation will bar the plaintiff's right under the 13 Eliz. c. 5, to have a settlement declared void (*m*).

How far the
settlement is
avoided.

When the settlement has been declared void as against creditors, it seems that, whether the settlor be living or dead, the fund will be administered for the benefit of all the creditors, and no priority will be gained by the plaintiff (*n*).

Inasmuch as the settlement "is void only as against creditors, and to the extent to which it is necessary to deal with the estate for their satisfaction" (*o*), it is not the practice to order it to be cancelled (*p*).

(*d*) *Barrack v. M'Culloch* (1856), 3 K. & J. 110. See *Ridler v. Kiddler* (1805), 10 Ves. 360; *Sims v. Thomas* (1840), 12 Ad. & E. 536.

(*e*) *Stokoe v. Cowan* (1861), 29 Beav. 637.

(*f*) *French v. French* (1855), 6 De G., M. & G. 95.

(*g*) 46 & 47 Vict. c. 52.

(*h*) *Tunkard, In re*, (1899) 2 Q. B. 57.

(*i*) *Skurf v. Soulby* (1849), 1 Mac. & G. 364; *Reese River Silver Mining Co. v. Atwell* (1869), L. R., 7 Eq. 347.

(*k*) *Goldsmith v. Russell* (1855), 5 De G., M. & G. 547.

(*l*) *Reese River Silver Mining Co.*

v. Atwell (1869), *supra*. See also *Colman v. Croker* (1790), 1 Ves. 160; *Collins v. Burton* (1859), 4 De G. & J. 612.

(*m*) *Maddever, In re* (1883), 31 W. R. 720.

(*n*) *Goldsmith v. Russell* (1855), 5 De G., M. & G. 547; *Adames v. Hallett* (1868), L. R., 6 Eq. 468; *Reese River Silver Mining Co. v. Atwell* (1869), *supra*.

(*o*) Per Sir William Grant in *Curtis v. Price* (1806), 12 Ves. 89, 103; and see *Exp. Bell* (1822), 1 Gl. & J. 282.

(*p*) *Bott v. Smith* (1856), 21 Beav. 511.

As a general rule the costs of the action must be borne by the unsuccessful party (*q*); and when the deed is declared void against creditors, the persons actively supporting it are liable to pay the plaintiff's costs (*r*), which may be ordered to be taxed as between solicitor and client (*s*). But trustees of settlements, originally valid, but avoided under sect. 47 of the Bankruptcy Act, 1883, are entitled to a lien for expenses properly incurred by them in their capacity as trustees (*t*). Chap. X. s. 3.

Even where the trustees or beneficiaries submit their interests to the Court, the utmost which the Court can do is to make the decree without costs (*u*).

Post-nuptial settlements of personal chattels, being bills of sale within the meaning of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), require to be attested and registered as provided by the 10th section of the Act; and if not so attested and registered within seven days after the making thereof (*x*), the settlement will be deemed fraudulent and void as against the trustee in bankruptcy and the execution creditors of the settlor (*y*). Where, however, the post-nuptial settlement is made in pursuance of an ante-nuptial agreement, it is a "marriage settlement," and is excepted from the definition of "bill of sale" contained in the Act (*z*). Voluntary settlements of chattels.

Chattels purchased after marriage, to replace those originally comprised in the settlement, will be within the protection of the marriage consideration (*a*).

By the 20th section of the Bills of Sale Act, 1878, it is enacted Bills of Sale Act, 1878.

(*q*) For an exception to this rule, see *Tetley, In re* (1896), 66 L. J., Q. B. 111.

(*r*) *Crossley v. Elworthy* (1871), L. R., 12 Eq. 158; *Mackay v. Douglas* (1872), L. R., 14 Eq. 106; *Tanqueray v. Bowles* (1872), *ibid.* 151; *Cornish v. Clark* (1872), *ibid.* 184.

(*s*) *Goldsmith v. Russell* (1855), *ubi supra*.

(*t*) *Holden, In re* (1887), 20 Q. B. D. 43.

(*u*) *Elsey v. Cox* (1858), 26 Beav.

95; and see *Townsend v. Westacott* (1841), 4 Beav. 58.

(*x*) 45 & 46 Vict. c. 43, s. 8.

(*y*) *Coburn v. Collins* (1887), 35 Ch. D. 373. See also *Fowler v. Foster* (1859), 5 Jur., N. S. 99; *Ashton v. Blackshaw* (1870), L. R., 9 Eq. 510.

(*z*) *Courcier v. Bardili* (1883), Sol. Journ. 276; and see *Holland, In re*, (1902) 2 Ch. 360, C. A.

(*a*) *Huslington v. Hill* (1784), 3 Dougl. 415; *Courcier v. Bardili* (1883), *supra*.

Chap. X. s. 3. that chattels comprised in a bill of sale, which has been and continues to be duly registered under the Act, shall not be deemed to be in the possession, order or disposition of the grantor within the meaning of the Bankruptcy Act, 1869 (*b*); and it has been held that during the seven days allowed for registration the order and disposition clause of the Bankruptcy Act does not apply to the chattels (*c*). Although this section of the principal Act has been repealed by the Amendment Act of 1882 (*d*), yet, since the latter Act applies only to bills of sale by way of security for the payment of money (*e*), the repeal is limited to bills of sale of that description (*f*); and chattels comprised in duly registered post-nuptial settlements are not to be regarded now, any more than before the Act of 1882, as in the order and disposition of the husband.

Effect of
bankruptcy.

The effect of the bankruptcy law upon voluntary settlements must now be briefly considered, and it must be borne in mind that, except in so far as they may be avoided by the provisions of a statute, voluntary settlements are good, not only against the settlor, but against all the world. By the 47th section of the Bankruptcy Act, 1883 (*g*), it is enacted that any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee

(*b*) 32 & 33 Vict. c. 71, s. 15, sub-s. 5. The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), contains a provision similar to the "order and disposition" clause of the earlier Act. See s. 44, sub-s. 3. And by sect. 149 it is enacted that "whereby any Act or instrument reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of the present

Act."

(*c*) *Hewer, In re* (1882), 21 Ch. D. 871.

(*d*) 45 & 46 Vict. c. 43, s. 15.

(*e*) Sect. 9. But an untrue statement of consideration does not make the bill of sale absolutely void under this section: *Heseltine v. Simmons*, (1892) 2 Q. B. 547.

(*f*) *Swift v. Pannell* (1883), 31 W. R. 543; 24 Ch. D. 210.

(*g*) 46 & 47 Vict. c. 52.

in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof (*h*).

In construing this section it has been held, in the case of a life policy settled upon voluntary trusts, that the payment of a particular premium is not to be regarded as securing a certain part of the total sum assured by the policy.

Post-nuptial settlements by policies of insurance.

The whole of the premiums are paid to keep up the policy, and no proportionate part of the money payable thereunder is earmarked by the payment of any particular premium. Consequently, it has been held that the *voluntary* payment of premiums by a settlor during the ten years preceding his bankruptcy did not constitute either the capital sum assured, or the payments made for the keeping up of such capital sum, a settlement within the meaning of sect. 47 of the Bankruptcy Act, so as to entitle the trustee in bankruptcy to any proportionate part of the moneys assured by the policy (*i*).

Sect. 47 of the Bankruptcy Act, 1883, differs from the corresponding clause of the Bankruptcy Act, 1869 (*k*), in two important particulars, viz. : (1) it applies to settlements made by all persons, and is not limited, as the earlier Act was, to those of traders; (2) a new condition is introduced by the concluding words, which impose, as a condition of validity, that the persons claiming under the settlement must prove that the interest of the settlor in the property had passed to the trustee of the settlement on the execution thereof. These words are calculated to raise questions of considerable difficulty; but their main object seems to be to avoid, as against the trustee in bank-

Differences between Bankruptcy Acts of 1869 and 1883.

(*h*) The value of the life interest taken by the settlor under the deed must be taken into account in estimating his solvency or insolvency: *Lovndes, In re* (1887), 18

Q. B. D. 677.

(*i*) *Harrison and Ingram, In re*, (1900) 2 Q. B. 710, C. A.

(*k*) 32 & 33 Vict. c. 71, s. 91.

Chap. X. s. 3. ruptey, all voluntary settlements which the volunteers could not have enforced. Where, however, a settlor constitutes himself a trustee (*l*), the transaction may possibly be impeached under this section, although, as between the settlor and the objects of his bounty, it is perfectly valid. Again, a post-nuptial settlement of personal chattels, with a power to substitute others for those included in the settlement, although registered as a bill of sale, would, as regards the substituted chattels, be void under this section (*m*). And wherever the matter rests in contract, and is not completed by a transfer of the legal or equitable interest of the settlor, the title of the trustee in bankruptcy must necessarily prevail (*n*).

The extension of the former law to the case of non-traders—a change not introduced in this section alone, but which pervades the whole of the Bankruptcy Act of 1883—is a still more important innovation.

Whether provision retrospective.

It was decided on the construction of the corresponding section of the former Act that it applied to settlements executed before it came into operation (*o*), and a question of practical importance arises, namely, whether the substituted provision of the present Act is similarly retrospective, or whether past settlements are to be governed by the law in force at the date of their execution. If there had been no previous enactment on the subject, the case of *Ex parte Dawson* would be an authority in favour of construing the present section as retrospective, but the repeal of the Bankruptcy Act, 1869, is qualified in such a manner (*p*) that it is open to argument that settlements executed before the 1st January, 1884, must stand or fall under the Act in force at the date of their execution. It must, however, be observed that the words “property which has accrued

(*l*) *Morgan v. Malleon* (1870), L. R., 10 Eq. 475; *Baddeley v. Baddeley* (1878), 9 Ch. D. 113; *Fox v. Hawks* (1880), 13 Ch. D. 822; *Re King* (1880), 14 Ch. D. 179.

(*m*) See *Courcier v. Bardili* (1883), 27 S. J. 276, where there was no bankruptcy and the settlement was upheld.

(*n*) See as to the impossibility of

transferring a future interest, *Collyer v. Isaacs* (1881), 19 Ch. D. 342.

(*o*) *Exp. Dawson* (1875), L. R., 19 Eq. 433.

(*p*) 46 & 47 Vict. c. 52, s. 169. At the present day the above disquisition on the retrospective character of the Bankruptcy Act, 1883, is, owing to the effluxion of time, of purely academic interest.

to the settlor after marriage *in right of his wife*," unless indeed Chap. X. s. 3.
 they have been blindly copied from the old Act, distinctly point
 towards a retrospective operation, inasmuch as after the
 1st January, 1883, a husband can acquire no property in that
 manner. If the words, then, are to have any meaning, it must
 be with reference to settlements executed before that date.
 The similarity of the provisions of the two Bankruptcy Acts on
 this subject renders the decisions on the earlier a valuable guide
 to the construction of the later enactment, and it may, in the first
 place, be remarked that the 10th section of the Married Women's
 Property Act, 1870 (*q*), which enabled a married man to insure
 his life for the benefit of his wife, modified the provisions of the
 91st section of the Bankruptcy Act, 1869, so far as related to
 the policies effected in pursuance of the Act (*r*).

The word "purchaser" in the 91st section means a buyer in
 the ordinary commercial sense, not a purchaser in the legal
 sense of the word, and accordingly the trustee of a post-nuptial
 settlement (*s*), to whom leaseholds subject to onerous covenants
 are assigned, is not a purchaser within the meaning of the
 section (*t*).

Under the 13 Eliz. c. 5, the persons impeaching the settle- Onus of proof.
 ment have to prove the insolvency or embarrassment of the
 settlor; under this section of the Bankruptcy Act the onus of
 proof for ten years is shifted to the settlor. In determining
 whether a trader who has executed a voluntary settlement was
 within the meaning of this section "able to pay all his debts
 without the aid of the property comprised in such settlement,"
 the value of the implements of his trade and of the goodwill of
 his business is not, if he intended to continue the business, to
 be taken into account; or at any rate only such a value can
 be taken into account as would be realized at a forced sale (*u*);

(*q*) 33 & 34 Vict. c. 93.

(*r*) *Holt v. Everall* (1875), 2 Ch.
 D. 266. And see Married Women's
 Property Act, 1882, s. 11. As to
 policies of insurance effected by a
 husband in favour of his wife and
 family when the transaction is not
 tainted by fraud, see *Harrison and*
Ingram, In re, (1900) 2 Q. B. 710.

(*s*) Per Jessel, M. R., in *Exp.*
Hillman (1879), 10 Ch. D. 622.

(*t*) Compare *Price v. Jenkins*
 (1877), 5 Ch. D. 619; *Exp. Doble*
 (1878), 26 W. R. 407.

(*u*) *Exp. Russell* (1882), 19 Ch. D.
 588; see also *Exp. Huxtable* (1876),
 2 Ch. D. 54.

Chap. X. s. 3. and the abolition of the distinction between traders and non-traders does not, it is presumed, affect the soundness of this decision.

Position of
purchasers.

A voluntary settlement may, as we have seen, be impeached by *creditors* of the settlor under three different statutes, viz., the Statute of Fraudulent Conveyances (*x*), the Bills of Sale Act (*y*), and the Bankruptcy Acts (*z*); but there is another class of persons—viz., subsequent purchasers for valuable consideration—whose statutory rights must now be considered. They were, by the 27 Eliz. c. 4, placed in a very similar position with reference to voluntary settlements to that occupied by creditors under the 13 Eliz. c. 5, except that the former statute does not extend to personal chattels, whereas the latter is perfectly general in its terms. It is enacted by the 27 Eliz. c. 4, that every conveyance, grant, charge, lease, estate, incumbrance and limitation of use of, in or out of any lands, tenements or other hereditaments whatsoever, *for the intent and of purpose to defraud and deceive purchasers*, shall be deemed and taken only as against such purchasers to be utterly void, frustrate, and of none effect (*a*). A saving clause is added, as in 13 Eliz. c. 5, in favour of conveyances made “for good consideration and *bond fide*” (*b*). By the 5th section, any power of revocation or alteration reserved to the settlor by the settlement renders it void as against subsequent purchasers.

Judicial interpretation
of statute.

Although, as pointed out by Lord Mansfield (*c*), there is not in this statute a word that impeaches voluntary settlements, merely as being *voluntary*, but as *fraudulent and covinous*, a long series of judicial decisions established the construction that a conveyance without valuable consideration is by the statute made void as fraudulent against a subsequent purchaser, and this even when the purchaser had notice of the prior settlement before the purchase money had been paid or the conveyance executed (*d*).

(*x*) 13 Eliz. c. 5.

(*y*) 41 & 42 Vict. c. 31.

(*z*) 32 & 33 Vict. c. 71, and 46 & 47 Vict. c. 52. As to when a settlement will be upheld in spite of these statutes, see *Eyre, Exp.* (1881), 44

L. T. 922.

(*a*) Sect. 2.

(*b*) Sect. 4.

(*c*) *Doe v. Routledge* (1777), Cowp. 705.

(*d*) *Doe d. Otley v. Manning*

The harshness of this interpretation, whereby "voluntary" is made equivalent to "fraudulent," has been mitigated by modern decisions, the tendency of which has been to lay hold of any, even the slightest, consideration, in order to exclude the operation of the statute. It is now, however, provided by the Voluntary Conveyances Act, 1893 (*e*), which effects a radical change in the law, that—

Chap. X. s. 3.

Tendency
of modern
decision.

Voluntary
Conveyances
Act, 1893.

Sect. 2. "Subject as hereinafter mentioned, no conveyance of any lands, tenements or hereditaments, whether made before or after the passing of this Act, if in fact made *bona fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding.

Sect. 4. "The expression 'conveyance' includes every mode of disposition mentioned or referred to in the said Act of Elizabeth."

(1807), 9 East, 59, where the early authorities are collected and reviewed. See also the remarks of Sir G. Jessel, M. R., in *Trowell v. Shenton* (1878), 8 Ch. D. 318, 325.

(*e*) 56 & 57 Vict. c. 20. This Act does not apply to purchases for value effected before its passing (sect. 3).

CHAPTER XI.

RIGHTS OF MARRIED WOMEN.

SECTION I.

THE SEPARATE USE AND SEPARATE PROPERTY.

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Importance of the doctrine of separate use.

THE doctrine of separate use formerly constituted a most important branch of the law relating to married women. But, in con-

sequence of the complete change in the law, and in the status of married women, effected by the Married Women's Property Acts, 1882 and 1893 (*a*), a knowledge of this doctrine and of the learning connected with it, has ceased to be requisite, except for the purpose of comprehending fully the value of the expression "separate property" in the Act, and of elucidating the cases of women married before the commencement of the Act, on whom property may devolve, the title to which shall have accrued before its commencement.

Formerly, at common law, the disabilities of coverture entirely precluded the wife from the enjoyment of property; whatever belonged to her while single, or came to her while covert, passed absolutely to the husband, or fell under his dominion. What was hers became his, and what was his remained his own. She could possess nothing; she could alienate nothing in her lifetime; she could bequeath nothing at her death (*b*). Such were the rigid maxims of the English marriage law.

Ch. XI. s. 1.
Separate use
unknown at
common law.

Inability of
the wife to
enjoy or dis-
pose of prop-
erty at law.

To remedy the injustice of this law, the Court of Chancery "invented that blessed word and thing, the separate use of a married woman" (*c*); a doctrine of the deepest importance, established by the Court of Chancery, under the wise administration of a succession of great men, without any help from the legislature. Hence, in equity, a married woman became enabled to enjoy property independently of her husband. And the effect was to protect her from the consequences of his improvidence, misfortunes, or misconduct under a law which gave him a power, almost unlimited, over her person and her estate.

Establish-
ment of the
separate use
by Courts of
Equity.

(*a*) 45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63. The former Act came into operation on 1st January, 1883.

(*b*) A married woman could not with certain exceptions make a will. But her husband might have waived the interest which the law gave him in her personal property, to the effect of enabling her to bequeath it. This waiver, however, he might have revoked even after her death before probate. And if he died

before his wife the will was void, so far as it derived validity from his consent. For it might be valid in other respects; as if it were in execution of a power, or if it passed the right of representation to a third person to whom she was executrix. See *Noble v. Willock* (1875), L. R., 8 Ch. 778; *ibid.*, 7 H. L. 580.

(*c*) Per James, L. J., in *Ashworth v. Outram* (1877), 5 Ch. D. 923, at p. 941.

Ch. XI. s. 1. It is not here proposed to attempt an antiquarian review of this remarkable creation. Indications of it are discernible so early as the reign of Queen Elizabeth. It seems to have been plainly recognized by Lord Nottingham, Lord Somers, and Lord Cowper. In Lord Hardwicke's time it was perfectly established; but it was not fortified and made secure till Lord Thurlow sanctioned the clause against anticipation, whereby the wife, for whose benefit this fabric had been reared, was precluded from destroying it (*d*).

How it might
be acquired.

Before the Married Women's Property Acts, 1870 (*e*) and 1882 (*f*), separate property might be acquired by the wife by contract with her husband before marriage, or by gift, either from her husband or from a stranger, wholly independent of such contract (*g*); but after marriage she was incapable of acquiring property by any act or exertions of her own, or of holding property in her own name. Separate property might, of course, devolve upon her by virtue of a will or under the trusts of a settlement, but in such cases the property was not acquired by any act of the wife.

Married
woman re-
garded in
equity, in
respect of
separate pro-
perty, as
feme sole.

In respect of her separate property, a married woman was regarded in equity as a *feme sole*; and to the extent of her rights and interests in such property, whether absolute or limited, she had power to alienate, to contract, and to enjoy, free from the control of her husband, as a *feme sole* (*h*).

What words
would create
it.

No particular form of words was necessary in order to vest property in a married woman to her separate use, but it was requisite that the intention to establish the separate use, if not expressed in words, should be clearly manifested (*i*). It was,

(*d*) See *Pybus v. Smith* (1791), 3 Bro. C. C. 340, and remarks of Lord Langdale, in *Tullett v. Armstrong* (1838), 1 Beav. 1, at p. 22.

(*e*) 33 & 34 Vict. c. 93.

(*f*) 45 & 46 Vict. c. 75.

(*g*) Per Lord Langdale in *Tullett v. Armstrong* (1838), 1 Beav. 1, at p. 21.

(*h*) See *Johnson v. Gallagher* (1861), 3 De G., F. & J. 494, 509.

(*i*) As in *Exp. Killick* (1844), 3 Mont. D. & De G. 480; *Shewell v. Dwarris* (1858), Johns. 172; *Green v. Britten* (1863), 1 De G., J. & S. 649; *Austin v. Austin* (1876), 4 Ch. D. 233. See also *Stanton v. Hall* (1831), 2 Russ. & Myl. 175, 180; *Tyler v. Lake* (1831), 2 Russ. & Myl. 183; *Kensington v. Dollond* (1834), 2 Myl. & K. 184.

of course, always created by the words *separate*, or *sole and separate* (*k*). Ch. XI. s. 1.

In ante-nuptial agreements the following words were held sufficient to create separate estate: "*the wife to dispose of all the rest of her estates*" (*l*); "*for her own sole use, benefit, and disposition*" (*m*). But an agreement not executed by the wife, whereby the husband renounces his marital rights, is not effectual to create the separate use, or to confer upon the wife any power of disposition by will over her real estate (*n*).

In cases of bequests to married women, such words as "*her receipt to be a sufficient discharge to the executors*" (*o*); "*to be delivered up to her whenever she should demand or require the same*" (*p*); "*for her own use and at her own disposal*" (*q*); "*for their own use and benefit independently of any other person*" (*r*); "*to be at her disposal and do therewith as she shall think fit*" (*s*); "*to be by her laid out in what she shall think fit*" (*t*); "*for her own use independent of her husband*" (*u*); "*without comprehending their husbands*" (*x*); "*solely and entirely for her own use and benefit*" (*y*); "*for her support and maintenance*" (*z*); were held sufficient to create the separate use.

In cases of a bequest to an unmarried woman, or a woman becoming discovert by the death of the testator, a very clear intention to exclude the marital right of a future husband was

(*k*) *Massy v. Rowen* (1869), L. R., 4 H. L. 288.

(*l*) *Petts v. Lee*, 4 Vin. Abr. 131, pt. 8.

(*m*) *Exp. Ray* (1815), 1 Madd. 199. But see *contra*, *Beales v. Spencer* (1843), 2 You. & Coll. 651.

(*n*) *Dye v. Dye* (1884), 13 Q. B. D. 147.

(*o*) *Lee v. Prieaux* (1791), 3 Bro. C. C. 381.

(*p*) *Dixon v. Olmius* (1795), 2 Cox, 414.

(*q*) *Prichard v. Ames* (1823), Turn. & Russ. 222.

(*r*) *Margetts v. Barringer* (1835), 7 Sim. 482.

(*s*) *Kirk v. Paulin*, 7 Vin. Abr. 95, pl. 43.

(*t*) *Atcherley v. Vernon* (1724), 10 Mod. 519, 531.

(*u*) *Wagstaff v. Smith* (1804), 9 Ves. 520. See also *Gurney v. Goggs* (1858), 25 Beav. 334.

(*x*) *Dawson v. Bourne* (1852), 16 Beav. 29.

(*y*) *Inglefield v. Coghlan* (1845), 2 Coll. 247.

(*z*) *Cape v. Cape* (1837), 2 Y. & C. 543. Cf. *Austin v. Austin* (1876), 4 Ch. D. 233, where trustees had an absolute discretion as to the application of the income.

Ch. XI. s. 1. necessary, in the absence of the word *separate*, to create the separate use (a).

It was decided in *Massy v. Rowen* (b), that the word "sole" was not a technical word in the sense of having a certain definite meaning, and that the use of it alone would not exclude the right of the husband.

Separate property might also be created by a limitation to a married woman for her separate use for life without any restraint on anticipation, followed by a general power of appointment by deed or will, with a final limitation to her executors and administrators (c).

Not affect the husband beyond the coverture.

The separate use existed only in the married state; it ceased on the dissolution of the marriage (d). The legal rights of the husband were, therefore, not encroached upon beyond the coverture. If he survived his wife, his position with reference to her property, whether real or personal, was the same as if it had never belonged to her for her separate use, provided that it remained undisposed of at her death. For a wife, who had property to her separate use, had a power of disposition over it by act or deed *inter vivos*, or by deed to take effect after death, or by will.

The wife might defeat his claim.

On wife's death husband entitled to her separate chattels personal. *Seem*, so also to her separate chattels real.

Accordingly, if undisposed of by her, the wife's chattels personal in possession held or settled to her separate use, belonged at her death to her husband surviving absolutely (e).

The wife's separate chattels real probably followed the same rule, the husband being entitled to maintain ejectment, after

(a) *Gilbert v. Lewis* (1863), 1 De G., J. & S. 38; *Goulder v. Camm* (1859), 1 De G., F. & J. 146. See *Massy v. Rowen* (1869), L. R., 4 H. L. 288, overruling *Adamson v. Armitage* (1815), 19 Ves. 416.

(b) *Ubi supra*, p. 295.

(c) See this subject more fully treated, *post*, Chap. XI. s. 2.

(d) A bill, however, filed against a *feme covert* in order to affect her separate estate was not defeated by the subsequent death of her hus-

band: *Field v. Sowle* (1827), 4 Russ. 112; *Nail v. Punter* (1831), 4 Sim. 474; and it might be filed even after his death: *Heatley v. Thomas* (1809), 15 Ves. 596; *Johnson v. Gallagher* (1861), 3 De G., F. & J. 494.

(e) *Molony v. Kennedy* (1839), 10 Sim. 254; *Askew v. Rooth* (1874), L. R., 17 Eq. 426; *Johnstone v. Lund* (1847), 15 Sim. 308; *Tugman v. Hopkins* (1842), 4 Man. & Gr. 389.

his wife's decease, without taking out letters of administration (*f*). Ch. XI. s. 1.

As regarded the wife's separate real estate, whether she were seised of a legal estate or possessed of an equitable estate of inheritance, it was settled that on the birth of issue capable of inheriting it, the husband surviving, if otherwise entitled, and not deprived by any disposition by the wife, was entitled as tenant by the curtesy (*g*). Tenant by the curtesy of her separate real estate.

If any of the wife's chuses in action were not reduced into possession at her death and were undisposed of by her, the husband was entitled to sue for them as her administrator, and to retain them as his own property, though settled to her sole and separate use as if she were sole and unmarried. In the case of *Proudley v. Fielder* (*h*), Sir J. Leach said, "These moneys were to be for the sole and separate use of Mrs. Leader, as if she were sole and unmarried. This expression has no reference to the devolution of the property after her death. There is not a word to vest it in her next of kin, or to defeat the right which her surviving husband is entitled to acquire as her administrator." Wife's separate chuses in action might be recovered by husband as her administrator.

So, where the wife of a bankrupt having separate chuses in action died, leaving her husband surviving, the claim of the assignees to the separate property, so far as undisposed of by the wife, was allowed (*i*).

The wife was not formerly bound to maintain her husband out of her separate property, or to bring any part of it into contribution for family purposes. But her position in this respect has, as we have already seen, been altered by the Married Women's Property Act, 1882, s. 20. Wife formerly not bound to maintain her husband.

The possession by the wife of separate property did not Possession of separate pro-

(*f*) *Pale v. Michell* (1711), 2 Eq. Cas. Abr. 138, pl. 4, n. (*d*).

(*g*) *Morgan v. Morgan* (1820), 5 Madd. 408; *Lushington v. Sewell* (1827), 1 Sim. 435; *Roberts v. Dixwell* (1738), 1 Atk. 607; *Follett v. Tyrer* (1844), 14 Sim. 125; *Hearle v. Greenbank* (1749), 3 Atk. 715; *Appleton v. Rowley* (1869), L. R., 8 Eq. 139; *Cooper v. Macdonald*

(1877), 7 Ch. D. 288, overruling *Moore v. Webster* (1866), L. R., 3 Eq. 267.

(*h*) (1833), 2 Myl. & K. 57; and see *Musters v. Wright* (1848), 2 De G. & Sm. 777; *Drury v. Scott* (1840), 4 Y. & C. Ex. 264.

(*i*) *Stead v. Clay* (1827), 1 Sim. 294.

Ch. XI. s. 1. formerly relieve the husband from his liability for his wife's debts; for, except as to those contracted on the credit of her separate estate, he remained liable, as if his wife had no separate property (*k*). The law upon this point has been altered by modern legislation, and except in cases in which it can be shown that the wife is acting as the agent of the husband, or has authority to pledge his credit, the husband will be no longer liable for debts contracted by his wife, whether she does or does not possess separate property (*l*).

Separate use
bound the
produce as
well as *corpus*.

The separate use was held to affect not only the *corpus* of separate property, but also the produce of it, and the savings arising from, and investments of, such property (*m*); and the wife could retain whatever might come to her hands in her own possession, as a chattel over which her husband had no power (*n*).

Revives on
subsequent
marriage.

When a married woman entitled to property for her separate use becomes discoverd and marries again, the separate use, as a general rule, revives upon the subsequent marriage (*o*). And a gift to an unmarried woman for her separate use effectually constitutes a separate use during coverture (*p*). During widowhood, the separate use comes to an end, and with it the restraint upon anticipation, if it exists; a widow can, accordingly, even when restrained from anticipation, call for a transfer to herself of the trust funds (*q*).

Ceases on the
termination of
coverture.

(*k*) Conf. *Johnson v. Gallagher* (1861), 3 De G., F. & J. 494; *Re Leeds Banking Co., Mrs. Matthewman's case* (1866), L. R., 3 Eq. 781; *Butler v. Cumpston* (1878), L. R., 7 Eq. 16; *Re London, Bombay and Mediterranean Bank* (1881), 18 Ch. D. 581.

(*l*) See *ante*, p. 95 *et seq.*, and 56 & 57 Vict. c. 63, s. 1.

(*m*) *Gore v. Knight* (1705), 2 Vern. 535; *Fettiplace v. Gorges* (1789), 1 Ves. jun. 46; *Cecil v. Juxon* (1737), 1 Atk. 278; *Darkin v. Darkin* (1853), 17 Beav. 578; *Churchill v. Dibben* (1754), 9 Sim. 447, n.; *Brooke v. Brooke* (1858), 25 Beav. 342; *Duncan v. Cashin* (1875), L. R., 10 C. P. 554.

(*n*) Conf. *Cecil v. Juxon* (1737), 1 Atk. 278; *Molony v. Kennedy* (1839), 10 Sim. 254. The contrary was formerly held at law; but it seems clear that the cases of *Tugman v. Hopkins* (1842), 4 Man. & Gr. 389, and *Carne v. Brice* (1840), 7 Mee. & W. 183, would have been decided differently in equity.

(*o*) *Re Gaffee* (1849), 1 Mac. & G. 541; *Hawkes v. Hubback* (1870), L. R., 11 Eq. 5.

(*p*) *Anderson v. Anderson* (1834), 2 Myl. & K. 427; *Tullett v. Armstrong* (1838), 1 Beav. 1; 4 Myl. & Cr. 377; *Newlands v. Paynter* (1839), 4 Myl. & Cr. 408.

(*q*) *Buttanshaw v. Martin* (1859), Johns. 89.

The separate use may be confined to a particular coverture (r), Ch. XI. s. 1. but a distinct indication of such intention must be discovered in the instrument creating the separate use. Thus, where, after a gift to a married woman for life for her separate use without power of anticipation, the unnecessary words were added "free from the debts, &c. of the then intended husband," it was settled that this reference to a particular husband was insufficient to confine the separate use to the period of union with him (s). Might be confined to particular coverture.

An existing or intended coverture might also have been excluded; as in *King v. Lucas* (t), where, by a post-nuptial settlement, policies on the life of the husband were assigned to trustees upon trust to receive the money, invest it in specified securities, and pay the income to the wife during her life for her separate use independently of any future husband whom she might marry. It was held by the Court of Appeal, reversing the decision of Kay, J., that the trust for the separate use did not arise till after the death of the husband, and that the property was therefore not available for the payment of a liability contracted during her first coverture.

Where property given to the separate use of the wife fell under the power of the husband, equity did not permit him to destroy her rights. Thus, if a trustee, without the express authority or implied consent of the wife, paid the *corpus* or the income of separate property to the husband, equity converted the husband himself into a trustee for her (u). In a recent case, where, with the sanction of the wife, the trustees of her settlement handed over the capital to her husband, upon a condition that he should pay interest on the same, the fact that the interest was neither demanded from nor paid by him during a long series of years was held not to avoid the bond, or defeat it Equity made the husband a trustee for his wife.

(r) *Moore v. Morris* (1857), 4 Drew. 33.

(s) *Re Gaffee, ubi supra*, overruling *Knight v. Knight* (1834), 6 Sim. 121; *Benson v. Benson* (1835), 6 Sim. 126; *Bradley v. Hughes* (1836), 8 Sim. 149; and see *Hawkes v. Hubback* (1870), L. R., 11 Eq. 5.

(t) (1882), 23 Ch. D. 712, C. A.

(u) *Rich v. Cockell* (1802), 9 Ves. 369, 375. See also *Izod v. Lamb* (1830), 1 Cr. & J. 35; *Gardner v. Gardner* (1859), 1 Giff. 126; *Archer v. Rorke* (1845), 7 Ir. Eq. Rep. 478; *Green v. Carlill* (1877), 4 Ch. D. 882.

Ch. XI. s. 1. under the Statute of Limitations (*x*). If there happened to be no trustee for the wife, so that the legal ownership vested consequently in the husband under his marital right, equity treated him as a trustee for his wife; as in *Bennett v. Davis* (*y*), where a father having made a devise of land in fee to his daughter, a married woman, for her separate use, without appointing any trustees, Sir Joseph Jekyll determined that the husband, who would otherwise have been entitled to take the profits in his own right during the coverture, should be "debarred and made a trustee for his wife."

The nomination of trustees therefore not necessary.

Where third parties have no notice of the trust.

It was therefore not actually necessary, though desirable in every case, that when the separate use was constituted by an instrument, trustees should be appointed thereby (*z*).

This right of the wife to the preservation for her own use of her separate property was held to fail as against third parties, who had been purchasers from the husband for valuable consideration without notice of the wife's interest, and had obtained the legal estate in, or legal possession of, the property from the husband (*a*). In such a case, the remedy of the wife was against the husband.

The Common Law Courts would protect the separate use.

Even at common law the separate use might be protected. It would seem, however, that formerly this could only have been effected by the interposition of a trustee holding the legal estate, for in such a case the Common Law Courts, following their own maxims, regarded the trustee as owner of the property, so as to save it from execution for the husband's debts (*b*).

But after the Judicature Act, 1873, this equity was enforceable for the protection of the wife's separate property, whether

(*x*) *Dixon, In re*, (1900) 2 Ch. 561, C. A.

(*y*) (1725), 2 P. Wms. 316. Conf. *Darkin v. Darkin* (1853), 17 Beav. 578.

(*z*) See *Duncan v. Cashin* (1875), L. R., 10 C. P. 554.

(*a*) *Dawson v. Prince* (1857), 2 De G. & J. 41; *Parker v. Brooke*

(1804), 9 Ves. 583. In this case, however, a purchaser was fixed with notice.

(*b*) The Courts of Common Law, previously to the Judicature Act, refused to recognize the trusteeship of the husband, and regarded the separate chattels of the wife as liable to execution for his debts. *Izod v. Lamb* (1830), 1 Cr. & J. 35.

the property were vested in a trustee for the wife, or in the wife herself, in all cases in which the property would in equity have been held property of the wife, and not of the husband (c). Ch. XI. s. 1.

The question whether the separate use could be established by parol, was a point which, it is believed, was not settled by decision (d). If the husband, before marriage, agreed that his wife should hold certain property to her separate use, such agreement, to be binding, should have been in writing, and signed as required by the Statute of Frauds (e). But if, during the coverture, either the husband or a stranger should have thought fit to dedicate a sum of money to the separate use of a married woman, there seems no reason why this might not have been effectually done by parol. The Statute of Frauds, it is conceived, would not apply to such a case. Might be established by parol.

Except in the manner before mentioned, a married woman was, prior to 1870, incapable of acquiring separate property. In that year the first step was taken by the Married Women's Property Act, 1870 (f), towards enabling a married woman to acquire and hold property as her separate property. This Act came into operation on the 9th August, 1870, and enabled every married woman to acquire separate property by her own industry and exertions in any employment carried on separately from her husband; to make deposits in savings banks and investments in her own name as her separate property, and to effect an insurance on her own life or on that of her husband for her separate use. Any woman married after the passing of this Act took also as her separate property the rents and profits of any real estate and all personal property devolving upon her as heiress or next of kin of an intestate. Separate property under the Act of 1870.

This partial measure remained in force until the 31st December, 1882. In that year the Married Women's Property Act, 1882 (g), Separate property under the Acts of 1882 and 1893.

(c) As to the effect given by Courts of law to equitable claims in cases under the Interpleader Act, see *Duncan v. Cashin* (1875), L. R., 10 C. P. 554.

(d) See *Simmons v. Simmons* (1847), 6 Hare, 352, where the point is touched upon by V.-C. Wigram.

(e) *Dye v. Dye* (1884), 13 Q. B. D. 147.

(f) 33 & 34 Vict. c. 93. This Act was repealed by the Act of 1882; but was in force from the 9th August, 1870, to the 31st December, 1882.

(g) 45 & 46 Vict. c. 75.

Ch. XI. s. 1. was passed. It came into operation on the 1st January, 1883, and has since been amended and amplified by the Married Women's Property Act, 1893 (*h*). It has affected not only the property of married women, but has made a complete change in their capacity or personal status.

Capacity of a married woman.

By the common law, the personality of a woman was on marriage almost entirely merged in that of her husband, and the disability attendant upon coverture was absolute and complete.

Personal status is the correlative of disability, and the removal of the latter necessarily creates or restores to a corresponding extent the privileges of an independent person, in other words of a citizen.

It must, however, be remembered that there is a disability of sex as well as a disability of coverture; and that the gradual removal of the disabilities of married women tends to place them on a level, not with their husbands, but with their unmarried sisters.

Under the Act of 1870.

Prior to the Act of 1882, the legislative inroads on the disabilities of coverture were of a comparatively trivial character (*i*). The Bill of 1870 contained clauses analogous to the provisions of sect. 1 of the Act of 1882, but these were not included in the Act as it became law, and the only respect in which a married woman's status can be said to have been altered by the Act of 1870 (*k*), is with reference to certain kinds of property which are by that Act constituted "separate property." This might comprise the wages, earnings, money and property by the Act declared to be separate property, as well as any property which belonged to the married woman before marriage, and which her husband by writing had agreed with her should belong to her after marriage as her separate property. If the property were vested in trustees, the married woman had her remedy in equity, and there was no need of additional protection; but with reference to the foregoing descriptions of property, there would be no trustees, and accordingly the Act of 1870 conferred upon

(*h*) 56 & 57 Vict. c. 63.

(*i*) The Fines and Recoveries Act (3 & 4 Will. 4, c. 74), and that known as Malins' Act (20 & 21 Vict.

c. 57), provided methods of dealing with property rather than removed disabilities of married women.

(*k*) 33 & 34 Vict. c. 93.

her an independent status at law, with respect to remedies for the recovery and protection of the separate property (*l*). By the 11th section it is enacted as follows :—

Ch. XI. s. 1.

“ A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels, or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, and property belonged to her as an unmarried woman; and in any indictment or other proceedings it shall be sufficient to allege such wages, earnings, money or property to be her property.”

Of this Act it was said by Sir G. Jessel, M. R. :—

“ It does appear to me that the present Act gives no power to contract to a married woman, which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a Court of equity, and it superadds to that certain remedies in a Court of law, which it is considered desirable to give to the married woman in respect of these small sums, but beyond that I think the Act makes no alteration in the position of a married woman” (*m*).

It would, therefore, appear that the Act of 1870 did not go far towards conferring on a married woman an independent status and capacity, her personality being still merged in that of her husband; and as according to the common law a person could not convey or transfer either real or personal property to himself, whether alone or jointly with another, it followed from this that neither husband nor wife could contract with the other, as, in the words of Littleton (*n*), “ A man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law.” Lord Coke (*n*) adds to this, “ A man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her for the reason that Littleton here

(*l*) See *Howard v. Bank of England*, L. R., 19 Eq. 295.

(*m*) *S. C.*, at p. 301.

(*n*) *Co. Litt.* 112 a.

Ch. XI. s. 1. yieldeth." Again, Bracton (o) states, "*Vir et uxor sunt quasi unica persona, quia caro una, et sanguis unus.*"

Conveyance
or transfer of
property by a
husband to
his wife.

The only method by which a conveyance or transfer of any kind of property by a husband to his wife could, previously to recent legislation, have been carried into effect, was by the interposition of a trustee, the property being conveyed or transferred by the husband to a third person in trust for the wife; but even then, unless a trust for the separate use were established in favour of the wife (though, in such circumstances, very slight evidence of intention would probably have sufficed (p)), the beneficial interest which the wife took in the property would have reverted to her husband.

Although a separate existence was given by the Courts of Equity to a married woman, this did not enable a husband to convey or transfer property to his wife even for her separate use. In two cases (q), indeed, the Courts supported a conveyance by a husband to his wife on the ground that it constituted a valid declaration of trust by the husband; but in a more recent case (r), V.-C. Hall, while characterising the state of the law as "monstrous," refused to follow the cases which have been cited.

In the case of a conveyance of freeholds by the husband to his wife for her separate use, it would seem that the beneficial interest passed to the wife, but that the legal estate remained in the husband.

To remedy this state of things the 50th section of the Conveyancing and Law of Property Act, 1881 (s), enacted that freehold land, or a thing in action, might be conveyed by a husband to his wife, and by a wife to her husband (t), alone or jointly with another person.

(o) Lib. 5, Tract. 5, cap. 25.

(p) It was suggested in *Exp. Beilby*, 1 Glyn & Jam. 167, that where a husband was sole trustee for his wife, a trust for her separate use must be inferred.

(q) *Badddeley v. Badddeley*, 9 Ch. D. 113; *Fox v. Hawks*, 13 Ch. D. 822.

(r) *Re Breton's Estate*, 17 Ch. D. 416.

(s) 44 & 45 Vict. c. 41.

(t) The question of the conveyance or transfer of property by the wife to the husband has not been discussed, for the reason that formerly if the wife had any property it must have been separate property,

What may be the construction and effect of this provision Ch. XI. s. 1. is now unimportant, as it seems to be entirely superseded by the fundamental changes in the legal position of the husband and wife, which have been introduced by the Married Women's Property Act, 1882.

It also followed from the principle that the husband and wife were but one person in law, that gifts or transfers of personal property by a third person to a married woman, unless specially given or transferred to her for her separate use, vested at once in her husband (*u*).

The Act of 1882 has, however, gone a great way towards removing the disabilities of coverture, conferring as it does upon a married woman alike a distinct legal entity and a personal contractual capacity.

With regard to property, the alterations effected may, perhaps, be thus summed up: by this Act not only were all the powers and incidents of separate property created by the Courts of Equity, attached in the case of every woman married on or after the 1st January, 1883, to all her property real and personal, and, in the case of every woman married before that date, to all property the title to which has accrued after that date, but every woman has been enabled since the 1st January, 1883, subject to certain limitations in the case of marriages contracted before

as to which she was treated in Equity as a *feme sole*, and could convey or transfer the beneficial interest to her husband, while the legal estate would either be already in him or vested in trustees.

(*u*) Conf. *Munder v. Harris*, 24 Ch. D. 222. There is some doubt whether, prior to the Act of 1882, the consent of the husband to a gift or transfer of property by a third party, whether a relative or a stranger, to his wife for her separate use, was not necessary to enable her to accept and enjoy it as her separate property; and whether, in the absence of such consent, the chattel

given or property transferred did not vest in the husband. It seems somewhat difficult to maintain the principle, that a husband could against his will be made a trustee for his wife of articles or property given or transferred to her by a stranger contrary to his wishes. Since the Act of 1882, no such difficulty as this can arise, as the wife can herself acquire and hold property as a *feme sole*; but it is not impossible that the question may still be raised whether a wife is entitled, against her husband's express wishes, to accept gifts, or transfers of property, from strangers.

Ch. XI. s. 1. that date, to acquire, to hold, and dispose of by will or otherwise, any real or personal property as her separate property, and to contract in respect of it, as if she were a *feme sole* (x).

Property of a woman married after the Act to be held by her as a *feme sole*.

Every woman married on or after the 1st January, 1883, is entitled to have and to hold as her separate property and to dispose of in manner aforesaid (y) all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband, or by the exercise of literary, artistic or scientific skill (z).

Property acquired after the Act by a woman married before the Act.

Every woman married before the 1st January, 1883, is entitled to have and to hold and to dispose of in manner aforesaid (a) as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue on or after that date, including any wages, earnings, money and property gained or acquired by her, as above mentioned, in the case of a woman married on or after the 1st January, 1883 (b).

After these general provisions, which confer upon a married woman the fullest power of entering into contracts, and of holding and disposing of property as if she were an unmarried woman, the Act enters into certain details regarding particular contracts.

It proceeds in several sections (c) to enact certain provisions with reference to investments and policies of assurance, of which the greater part would seem to follow necessarily from the capacity and rights and powers conferred upon a married woman by the general enactments of the earlier sections. These sections appear to have been adapted from the similar provisions in the Act of 1870, without perhaps sufficient consideration having been given to the fact that the Act of 1882 in its scope and results is essentially different from the Act of 1870.

(x) 45 & 46 Vict. c. 75, s. 1.

(y) *Ibid.*

(z) 45 & 46 Vict. c. 75, s. 2.

(a) *Ibid.* See sect. 1.

(b) *Ibid.* s. 5.

(c) *Ibid.* ss. 6—11.

All deposits, annuities and sums forming part of the public funds, and all other investments standing in the sole name of a married woman on the 1st January, 1883, are to be deemed, unless and until the contrary shall be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, &c. is standing in the sole name of a married woman shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to empower her to deal with the same and receive the dividends and interest thereof without the concurrence of her husband (d).

Ch. XI. s. 1.

Investments in the name of a married woman at the date of the Act.

Any deposits, annuities or other investments placed or made to stand in the sole name of a married woman after the 1st January, 1883, are, unless and until the contrary be shown, her separate property, and her separate estate alone is liable for any liability incident thereto. No corporation or company, however, is bound to admit a married woman to be a holder of any shares or stock to which a liability may be incident contrary to the provisions of their constitution (e). There is no doubt that under this provision a married woman may invest in her own name in any kind of investment, however large may be the liability which she may incur thereby, for calls or otherwise, and that her husband is relieved from all liability in respect of her investments.

Investments of a married woman after the date of the Act.

All these provisions are, so far as relates to the interest of a married woman therein, specifically extended to any deposits, annuities and investments standing on the 1st January, 1883, or at any time afterwards placed or made to stand in the name of any married woman jointly with any persons or person other than her husband (f); and it is not necessary for the husband of any married woman in respect of her interest to join in the transfer of any annuity, deposit or investment, whether standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband (g).

Investments in the joint names of a married woman and persons other than her husband.

As a complete separate existence, and capacity of holding and dealing with property, had been given to a married woman, and

Provisions against fraud.

(d) *Ibid.* s. 6.

(e) *Ibid.* s. 7.

(f) *Ibid.* s. 8.

(g) *Ibid.* s. 9.

Ch. XI. s. 1. the inability of the wife to act independently and of the husband to make a gift or transfer of property directly to his wife had been abolished, it became necessary to guard against fraud being committed—on the one hand, on the part of the wife by fraudulent investment of her husband's moneys in her own name, and on the other hand, on the part of the husband by gifts by him to the wife in fraud of creditors. Accordingly, if any investments be made by a married woman by means of moneys of her husband without his consent, the Court may order such investment or any part thereof to be transferred to the husband; and nothing in the Act contained gives validity, as against creditors of the husband, to any gift by a husband to his wife of any property which after such gift shall continue in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of the wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if the Act had not passed (*h*).

Policies of
assurance.

Another species of separate property which can now be acquired by a married woman is that of policies of assurance.

Act of 1870.

The right of a married woman to effect a policy of assurance was first given by the Married Women's Property Act, 1870 (*i*); but what was given by that Act was only a statutory power, and the power was limited to enabling a married woman to effect a policy upon her own life or the life of her husband for her separate use.

It has been held in the case of a life policy effected by a man under this Act, and expressed to be "for the benefit of his wife, or if she be dead, between his children in equal proportions," that the benefit of the policy did not enure to the assured's second wife, but were confined to the coverture existing at the time when the policy was effected, although it was decided

(*h*) 45 & 46 Vict. c. 75, s. 10.

(*i*) 33 & 34 Vict. c. 93, s. 10.
Upon a petition by a widow for the appointment of trustees to receive payment of the moneys secured by a policy of insurance, effected under

this Act, on the life of her husband, and expressed to be for her benefit, it was held that the petition was properly entitled *only* in the matter of the Act of 1870. *Kuyper's Policy Trusts, In re*, (1899) 1 Ch. 38.

that a child by the second marriage was entitled to share with the children of the first wife (*k*). It seems probable, however, that the decision was arrived at upon the construction placed by the Court upon the expressions used in the policy, as in another recent case (*l*), in which a married man effected a policy of assurance on his life under the Act of 1882, expressed to be "for the benefit of his wife and children," it was held that the widow (who was his second wife) and her child were entitled to participate jointly with the children of the first marriage. Ch. XI. s. 1.

Under the Married Women's Property Act, 1882 (*m*), the right to effect a policy of assurance is specifically based upon the general power of a married woman to make contracts; and the words of the section seem intended to emphasize the complete independent status and capacity given by the Act to married women; for it is enacted that— Act of 1882.

"A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life, or the life of her husband, for her separate use; and the same and all benefit thereof shall enure accordingly. Sect. 11.

"A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts. Provided that if it shall be proved that the policy was effected, and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy, a sum equal to the premiums so paid" (*n*).

The right to enter into a contract of assurance would without express enactment have been conferred by the general power of entering into contracts given by the 1st section of the Act; so that it would seem that the words "by virtue of

(*k*) *Griffith's Policy, In re*, (1903)
1 Ch. 739.

(*l*) *Browne's Policy, In re*, (1903)
1 Ch. 188.

(*m*) 45 & 46 Vict. c. 75, s. 11.

(*n*) As to the exact relation between the payment of an insurance premium and the capital sum which it is intended to secure, see *Harrison and Ingram, In re*, (1900) 2 Q. B. 710, C. A.

Ch. XI. s. 1. the power of making contracts hereinbefore contained" are unnecessary.

Effect of the section.

The following propositions state the effect of the section :—

1. A policy effected by a married woman on her own life will be her separate property, form part of her estate, and be subject to her debts.

2. A policy effected by a married woman on the life of her husband must, in order to render it her property, be effected on his life for her separate use, and if so effected will be her separate property, form part of her estate, and be subject to her debts.

3. A policy intended to be for the benefit of the husband, or of the children of any woman, or of both, or either, must be effected by her on her own life, and be expressed in the policy to be effected for the benefit of the objects intended, and if so effected will create a trust for the objects named in the policy ; and so long as any object of the trust exists, the policy does not form part of her separate estate, and is not subject to her debts.

4. Similarly, a policy effected by a man on his own life, and expressed in the policy to be effected for the benefit of his wife or children, or both or either, will enure for their benefit, and not form part of his estate or be subject to his debts.

5. A policy effected by a man on his own life, and expressed to be for the benefit of his wife, or of his wife and children, will, to the extent of the interest taken by the wife, form part of her estate, whether she survive her husband or not, and be assets for the payment of her debts.

6. Similarly, a policy effected by a woman on her own life, and expressed to be for the benefit of her husband, or of her husband and children, will, to the extent of the interest taken by the husband, form part of his estate, whether he survive his wife or not, and be assets for the payment of his debts.

In no case where the policy moneys are settled by the Act can the insured affect such moneys by act *inter vivos* or by will.

In either of the cases where a policy is effected by the husband for the benefit of his wife and children, or either, or by the wife for the benefit of her husband and children, or either, if it be

Assurance
and payment
of premiums
in fraud of
creditors.

proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they are entitled to receive out of the policy moneys a sum equal to the premiums so paid. Two conditions must co-exist to entitle the creditors to recover the premiums paid; namely, that the policy has been effected *and* the premiums paid with intent to defraud creditors. If it be proved that the policy has been effected with intent to defraud creditors, it will follow almost as a matter of course that the premiums paid on a policy effected with that intent, if paid by the insured, have also been paid in fraud of creditors; but if it fail to be proved that the policy was effected with that intent, it appears impossible to allege that premiums paid by the insured have been paid with intent to defraud creditors. And in all cases it seems probable that the burden of proving fraudulent intent lies on the party seeking to impugn the *bond fides* of the assured.

If the premiums have been paid by some person other than the insured, it would seem that they cannot, in any event, be said to have been paid in fraud of creditors, and that in that case the creditors will not be entitled to such premiums; and that, even if the insured has paid the premiums, the intent to defraud must be proved (*o*).

If the interests to be taken by the wife and children in the moneys payable under the policy are not expressed upon the policy further than by the words "for the benefit of the wife and children," these words will be construed as vesting the property in the widow and children as tenants in common (*p*).

If, previously to the passing of this Act, a married man, being insolvent and a trader, had effected a policy on his life, and either by the same or a separate instrument had declared a trust for the separate use of his wife, that would have been a settlement of property within the 91st section of the Bankruptcy Act, 1869 (*q*); but, it would seem, that where a policy

Ch. XI. s. 1.

Construction of the words "for the benefit of the wife and children."

Proceeds of policy not affected by subsequent bankruptcy.

(*o*) *Conf. Holt v. Everall* (1875-6), 2 Ch. D. 266. *Policy Trusts, In re* (1883), 23 Ch. D. 525.

(*p*) *Seyton, In re* (1887), 34 Ch. D. 511; *Davies' Policy Trusts, In re*, (1892) 1 Ch. 90. But see *Adam's* (*q*) *Holt v. Everall* (1875-6), 2 Ch. D. 266.

Ch. XI. s. 1. is effected under this Act (*r*), it is not within the provisions of sect. 47 of the Bankruptcy Act, 1883 (*s*), which avoids voluntary settlements, and replaces sect. 91 of the Bankruptcy Act, 1869; and that, even in the case of a policy effected in fraud of creditors, they are only entitled to receive out of the moneys payable under the policy, when paid, a sum equal to the premiums paid, and that the surplus, if any, will belong to the insurer.

*Holt v.
Everall.*

In the case of *Holt v. Everall* (*t*), which was a case upon a similar provision in the Married Women's Property Act, 1870, a trader insured his life in April, 1870. In April, 1871, the policies were surrendered, and two new policies at the same premiums and for the same sums were issued, payable to the separate use of his wife if she survived him, and to him if he survived her. In January, 1873, the husband presented a petition for liquidation. In June, 1873, he died. Holt, the trustee in the liquidation, claimed to be entitled, as against the widow, to the moneys payable under the policies, on the grounds that the bankrupt being a trader, and having become bankrupt within two years from the date of the policies of 1871, the policies were affected by the 91st section of the Bankruptcy Act of 1869, by which any settlement of property made by a trader upon his wife and children is void as against the trustee in bankruptcy if he becomes a bankrupt within two years from the date of the settlement of the property, and also that they were a settlement of the then existing property of the bankrupt. It was held, however, that the new policies were in terms within the 10th section of the Married Women's Property Act, and not within the 91st section of the Bankruptcy Act, 1869; that they were not settled property within that section; that there was nothing substantial arising from the fact of the exchange of the old policies for the new policies: for the old policies being of no value, there was nothing taken away from the creditors; and that the widow was entitled to the moneys payable under them (*u*).

(*r*) 45 & 46 Vict. c. 75.

(*s*) 46 & 47 Vict. c. 52. There is now no distinction in this respect between traders and non-traders.

(*t*) (1875-6), 2 Ch. D. 266.

(*u*) And see *Harrison and Ingram*,
In re, (1900) 2 Q. B. 710, C. A.

If, in a transaction of a similar kind, any actual property or value were given up as part of the consideration for the issue of new policies, the question would arise, what was the real substance of the transaction, whether, being within the words of the Married Women's Property Act, and not within the words of the Bankruptcy Act, it was not a device to avoid the provisions of that Act, and void as a fraud upon the legislature. But, in the case of *Holt v. Everall* (x), the policies given up were of no value. It was also proved in that case that the premiums had been paid out of the wife's separate property, and, accordingly, the provision at the end of the 10th section of the Married Women's Property Act, 1870, did not apply; and the trustee in liquidation was not entitled to receive out of the insurance moneys the amount of the premiums paid.

A trustee of the moneys payable under the policy may be appointed by the assured in the policy, or by an independent instrument or memorandum, and provision may be in like manner made for the investment of the moneys. If no trustee be appointed, the policy, on being effected, vests in the assured and his or her legal personal representatives in trust for the objects named in the policy (y).

Trustee of
policy
moneys.

If at the death of the assured, or at any time afterwards, there is no trustee, a trustee may be appointed by any Court having jurisdiction under the Trustee Acts (z).

It has been held, that where a policy had been effected under the Act of 1870, and became payable in 1883, a petition for the appointment of a trustee must be entitled in the matter of the Act of 1882, for that the Act of 1870 having been repealed by the Act of 1882, the 10th section of the Act of 1870 did not remain in force for any purpose, notwithstanding the saving clause of the 22nd section of the Act of 1882 (a). Having regard, however, to the ruling in a more recent case, this decision can no longer be regarded as authoritative (b).

(x) (1875-6), 2 Ch. D. 266.

(y) 45 & 46 Vict. c. 75, s. 11.

(z) *Ibid.* s. 11. The Trustee Act, 1850, is specified in the Married Women's Property Act, 1882. This is now repealed, and has been

replaced by the Trustee Act, 1893 (56 & 57 Vict. c. 53).

(a) *Re Soutar's Policy Trusts* (1884), 26 Ch. D. 236.

(b) *Kuyper's Policy Trusts, In re*, (1899) 1 Ch. 38.

Ch. XI. s. 1.

Receipt by
trustee.

The receipt of the trustee, or, if no notice be given to the insurance office of his appointment, the receipt of the legal personal representative of the insured, is a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

SECTION II.**SEPARATE PROPERTY—THE WIFE'S POWER OF DISPOSITION.**

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"Property," said Lord Thurlow, in *Fettiplace v. Gorges* (c), Ch. XI. s. 2.
 "the moment it can be enjoyed, must be enjoyed with all its incidents" (d). Therefore, when married women were allowed to enjoy property independently of their husbands, the privilege necessarily implied a *jus disponendi*. Accordingly, it was said that a wife might dispose of her separate property as if she were sole. Her power of disposition over her separate property.

As a modern exemplification of this proposition, it may be mentioned that a married woman, to whom, subsequently to the Married Women's Property Act, 1882, real estate was conveyed by way of mortgage to secure money belonging to her as her separate property, was held entitled to convey to a purchaser from the mortgagor without either the concurrence of her husband or acknowledgment of the deed of conveyance by her under the Fines and Recoveries Act (e).

Formerly, a married woman entitled to separate property or income unfettered by any restraint on anticipation could, in equity, bind it and render it liable to her debts, both during coverture and after the coverture ceased (f). She could, in equity, validly dispose of any and all her separate property, whether chattels personal in possession, reversionary interests in chattels real (g), reversionary choses in action, or real estate in possession (h) or in remainder (i).

There was, at one time, some doubt whether a married woman, entitled to an equitable estate in fee for her separate use, could convey the same, otherwise than by deed duly executed and acknowledged in conformity with the provisions of the Fines and Recoveries Act (k), so as to bind the heir. But this was settled Separate real estate.

(c) (1789), 1 Ves. jun. at p. 49.

(d) This dictum of Lord Thurlow's was applied by him only to personal property; but there seems no reason to limit its application.

(e) *Brooke and Fremlin's Contract, In re*, (1898) 1 Ch. 647.

(f) *Johnson v. Gallagher* (1861), 3 De G., F. & J. 494.

(g) *Major v. Lansley* (1831), 2 Russ. & M. 355; *Donne v. Hart* (1831), 2 Russ. & M. 360. See also *Sturgis v. Corp* (1806), 13 Ves. 190.

(h) *Taylor v. Meads* (1865), 4 De G., J. & S. 597; *Cooper v. Macdonald* (1877), 7 Ch. D. 288.

(i) *Pride v. Bubb* (1871), L. R., 7 Ch. 64.

(k) 3 & 4 Will. 4, c. 74.

Ch. XI. s. 2. by the decision in *Taylor v. Meads* (l), where Lord Westbury said :—

Taylor v. Meads.

“ With respect to separate property, the *feme covert* is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation. . . . It would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. . . . I must hold, therefore, that a *feme covert*, where not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation over that property, by instrument *inter vivos* or by will.”

Power of disposition did not extend to legal estate.

This power of disposition did not extend to the legal estate, which was not affected by the equitable doctrine of the separate use. In order, therefore, to pass the legal estate, the concurrence of the trustees in whom it was vested was necessary ; and where there were no trustees, and the legal estate consequently vested in the husband, the provisions of the Fines and Recoveries Act had to be complied with. But it would probably be held that if the wife disposed of her equitable fee, the purchaser might call for a conveyance of the legal estate.

Formerly it was held at law, where equitable principles were disregarded, that a married woman could not, except in exercise of a power, devise real estate limited to her in fee for her separate use, although such a devise would have been held perfectly valid in equity. But the Judicature Act, 1873 (m), by uniting all the Courts, and enacting that in cases of conflict or variance the rules of equity should prevail over those of the common law, abolished this distinction ; and, accordingly, such a devise would be held valid in any Court.

She might bestow her separate property on her husband.

As the wife was in equity considered a *feme sole* with reference to her separate property, she might, of course, make a present of it to her husband (n), although at law there was, in general, no such thing known as a *donatio inter virum et uxorem*.

(l) (1865), 4 De G., J. & S. at pp. 604, 607.

(m) 36 & 37 Vict. c. 66, s. 25 (11).

(n) A married woman having a fund settled to her separate use may assign it to her husband : *Lynn v.*

The wife's examination and consent in Court was entirely unnecessary with reference to her separate property. But where it was a fund in Court, it would not be paid to the husband, unless her consent had been taken in Court (o). Ch. XI. s. 2.
Her examination and consent in Court not necessary.

This free and uncontrolled power of disposition of her separate property as if she were a *feme sole*, formerly created and bestowed upon a married woman by the Courts of Equity, is now by statute (p) given to every woman married after the 1st January, 1883, over all her property, of any description, at any time, and however acquired, unless a restraint on anticipation be attached thereto; and to every woman married before the 1st January, 1883, over all her property, the title to which has accrued on or after that date, and which she is not restrained from anticipating. Power of disposition now conferred by statute.

It has, however, been held in the case of *March, In re* (q), that where a testatrix, dying in 1883, bequeathed residuary personal estate to A. and to B., and B.'s wife, C. (B. and C. having been married in 1862), that in spite of the Married Women's Property Act, 1882, the entity of C. was so absorbed in that of her husband, B., as to entitle the two spouses to one moiety only of the residuary estate, the other moiety belonging to A.

The following propositions are, it is conceived, as much law now as prior to the passing of the Act of 1882 :— Old law unaltered in certain cases.

When the wife has made a gift to her husband, she will be precluded after his death from making any claim against his estate in respect of what he so received (r). But there is a resulting trust for the wife if, in the absence of evidence of the wife's acquiescence, a husband expend her money in the purchase of property in his own name (s).

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| <p><i>Ashton</i> (1830), 1 Russ. & M. 188, 190; <i>Gardner v. Gardner</i> (1859), 1 Giff. 126.</p> <p>(o) <i>Milnes v. Busk</i> (1794), 2 Ves. jun. 488; <i>Wordsworth v. Dayrell</i> (1856), 4 W. R. 689.</p> <p>(p) 45 & 46 Vict. c. 75, ss. 1 (1), 5.</p> <p>(q) <i>March, In re</i> (1884), 27 Ch. D.</p> | <p>168, C. A.</p> <p>(r) <i>Pawlet v. Delaval</i> (1755), 2 Ves. sen. 663; <i>Milnes v. Busk</i> (1794), 2 Ves. jun. 488; <i>Bartlett v. Gillard</i> (1826), 3 Russ. 149. See also <i>Caton v. Rideout</i> (1849), 1 Mac. & G. 599.</p> <p>(s) <i>Mercier v. Mercier</i>, (1903) 2 Ch. 98, C. A.</p> |
|---|--|

Ch. XI. s. 2.

When husband applies the separate property to the use of the family.

When she allows him to take it and makes no claim.

If the wife allow her husband to receive her separate income, and he apply it to the use of the family, she will be presumed to have assented to this arrangement (*t*); and it may be laid down that in such a case, if the wife do not make a claim to her separate income, she will, in general, and unless there be circumstances suggesting an opposite construction, be held to have assented to and acquiesced in the receipt of it by her husband (*u*); the rule being, that separate property of the wife paid to the husband, with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled (*x*). It is submitted, however, that where the husband is sole surviving trustee of his wife's settlement, and in that capacity receives and retains the annual income accruing therefrom, very strong evidence of acquiescence by the wife in such an arrangement will be required to disprove a presumption of undue influence (*y*).

When she will be entitled to reimbursement from his estate.

If the circumstances do not warrant the inference that the wife has assented to or acquiesced in the husband's receiving her income, or in his mode of applying it, she will be entitled to reimbursement out of his estate (*z*).

In directing an account against husband his extra expenses will be considered.

In directing an account of the wife's separate estate against her husband, consideration will be given to any extra expenses which he may have incurred for her maintenance; as in *Attorney-General v. Parnter* (*a*), where the husband was subjected to outlays distinct from ordinary family expenditure by reason of his wife being insane. The Court does not proceed on the

(*t*) *Squire v. Dean* (1793), 4 Bro. C. C. 326; *Carter v. Anderson* (1830), 3 Sim. 370; *Rowley v. Unwin* (1855), 2 K. & J. 138; *Corbally v. Grainger* (1855), 4 Ir. Ch. Rep. 173; *Payne v. Little* (1858), 26 Beav. 1.

(*u*) *Beresford v. Archbishop of Armagh* (1844), 13 Sim. 643; *Caton v. Rideout* (1849), 1 Mac. & G. 599; *Dixon v. Dixon* (1878), 9 Ch. D. 587.

(*x*) *Caton v. Rideout* (1849), 1 Mac. & G. 599.

(*y*) See on this point, *Wassell v. Leggatt*, (1896) 1 Ch. 554.

(*z*) *Parker v. Brooke* (1804), 9 Ves. 583. It was insisted in this case that the husband, having received property settled to the separate use of his wife, must account for it. Sir W. Grant said: "There could be no doubt in giving the account." *Darkin v. Darkin* (1853), 17 Beav. 578; and see *Wassell v. Leggatt*, (1896) 1 Ch. 554.

(*a*) (1793), 4 Bro. 408.

principle which governs its discretion in the case of an infant, Ch. XI. s. 2.
whose father is never allowed for maintenance unless he appear
not to be of ability (b).

Where a wife was in an asylum and her husband was unable to maintain her there, the Court ordered that the surplus income of her separate property should be paid to him, but refused to apply any part of the principal fund to reimburse him in respect of what he had actually paid for her past maintenance (c). Where a stranger advanced moneys to provide necessaries for the support of a married woman living separate from her husband, it was held that he was entitled to repayment after her death out of her separate estate, and, the funds being held in trust for her, that the debt was not barred by the Statute of Limitations (d).

Where the husband had received advances from the trustees of the wife's separate property, and where she had lived with him till he died, on a bill filed by her against the trustees, it was held by Sir W. Grant that the account ought not to be carried back beyond the period of his death (e). But it has been held that an advance of settled money by trustees of the settlement to the wife, with knowledge that it would be handed over by her to her husband to pay a debt due from him to one of the trustees, constitutes a breach of trust (f). The savings of the wife out of the income of her separate property, not given by her to the husband, may be followed if invested in his name (g); and money laid out by a husband in improvements to his wife's separate real estate accedes thereto (h).

How far the account will be carried back.

The wife may authorize her husband to receive her separate Satisfaction of wife's

(b) *Brodie v. Barry* (1813), 2 Ves. & B. 36.

(c) *Re Spiller* (1860), 6 Jur., N. S. 386; *Re Baker's Trusts* (1871), L. R., 13 Eq. 168; *Edwards v. Abrey* (1846), 2 Phil. 37.

(d) *Hodgson v. Williamson* (1880), 15 Ch. D. 87, but *quære*.

(e) *Dalbiac v. Dalbiac* (1809), 16 Ves. 116.

(f) *Molyneux v. Fletcher*, (1898) 1 Q. B. 648.

(g) *Darkin v. Darkin* (1853), 17 Beav. 578. See *Rowe v. Rowe* (1848), 2 De G. & Sm. 294; *Barrack v. M'Culloch* (1856), 3 K. & J. 110; *Scales v. Baker* (1859), 28 Beav. 91; and see *Mercier v. Mercier*, (1903) 2 Ch. 98, C. A.

(h) *Barrack v. M'Culloch* (1856), 3 K. & J. 110.

Ch. XI. s. 2.
claim on her
debtor by his
payments to
her husband.

income from the party bound to pay it; and this will satisfy the demand; or she may produce the same effect by tacit and implied acquiescence. Thus in *Bartlett v. Gillard* (i), an annuity given to the separate use of a married woman was held to be discharged by payments made to the use of the husband, and sums allowed him on account; the circumstances being such as to satisfy the Court that the mode of dealing between the person who was bound to pay the annuity and the husband was with the acquiescence of the wife, or with her authority express or implied.

In *Carter v. Anderson* (k) this doctrine was carried still further; for there a married woman was entitled to an annuity of 500*l.* for her separate use, charged on an estate not belonging to her husband, but of which he was, under a power of attorney, in receipt of the rents. It appeared that for several years she had made no demand upon the owner of the estate, while, on the other hand, her husband became his debtor in respect of the rents received by him, and was declared a bankrupt. She then instituted a suit against the owner, claiming arrears accrued during the period while her husband had received the rents; but was met by the objection that she had already, through her husband, received the income, and enjoyed it, and therefore was not entitled to demand it over again. Sir Lancelot Shadwell held, that as she had resided with her husband all the time, as she had had the benefit of his expenditure, as she knew that he was in receipt of the rents, and as she had made no claim on the owner until after her husband's bankruptcy, she was, under all the circumstances, precluded from enforcing her demand (l).

Restriction on
loans by the
wife to her
husband.

Although the general scope of the Act of 1882 is to render a married woman independent of her husband, and to enable her to deal with her property in any manner she may think fit, as if she were an unmarried woman, yet in one respect the legislature seems to have considered, that the relations of husband and wife constituted such a community of interest between the

(i) (1826), 3 Russ. 149.

(k) (1830), 3 Sim. 370.

(l) *Carter v. Anderson* (1830), 3 Sim. 370, at p. 373.

parties that a restriction should be placed on pecuniary dealings between the wife and the husband. Ch. XI. s. 2.

This is effected by the 3rd section, which is as follows :—

“ Any money or other estate (*m*) of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.”

This section is the only instance in which this enabling statute imposes upon a married woman a restriction which did not previously exist. It appears to recognize as a fact that, notwithstanding the independent status and capacity conferred by the Act upon married women of dealing with their property with any person whomsoever, including their husbands, dealings by a wife with her husband with regard to her separate property are not on the same footing as her dealings with third parties, nor on the same footing as dealings by a husband with his wife; and it therefore endeavours to limit and restrict the lending or entrusting of property by her to him by enacting that in the case of his bankruptcy she shall not be entitled to any dividend until all his creditors for value have been fully paid.

It should, however, be noted that this section applies *only* to property entrusted by a wife to her husband for the purpose of any trade or business carried on by him (*n*). Includes property entrusted for business purposes only.

Nor is the onus in every case thrown upon the wife of showing that the loan was not made for the purpose of her husband's business (*o*). Judicial ruling has also decided that it does not apply where the loan, though made for purposes of trade or business, was not to the husband but to the firm in which he was a partner (*p*). Moreover, as the section refers to bankruptcy only, a widow, administering to her late husband's insolvent

(*m*) Such “ estate ” is not necessarily *ejusdem generis* with money : 330, C. A.
Donaldson, In re, (1902) 2 Ir. R. 88. (*o*) *Tuff, In re* (1887), 19 Q. B. D.
 310, C. A. (*p*) *Cronmire, In re*, (1901) 1
 (*n*) *Clark, In re*, (1898) 2 Q. B. Q. B. 480.

Ch. XI. s. 2. estate, is entitled to retain out of assets coming into her hands as administratrix, the amount of a loan advanced to him for his business out of her separate estate (q).

It has, however, been held that section 3 of the Married Women's Property Act, 1882, when combined with section 10 of the Judicature Act, 1875, applies to the estate of a deceased person, which though sufficient for payment in full of his debts and liabilities, apart from the costs of administration, becomes insufficient by reason of such costs (r).

Apparently, this section only applies where "the money or other estate of the wife" is vested in her without the intervention of trustees; consequently, a loan of the wife's money by and in the names or through the intervention of trustees, will not bring the transaction within the mischief contemplated thereby.

No corresponding restriction upon the husband.

It will be observed that there is no corresponding restriction upon the husband's right to prove, in the case of the bankruptcy of his wife, against her estate for any money or property lent or entrusted by him to her, so that this anomaly follows, namely, that if a wife carries on a separate trade, and her husband lends or entrusts money to her, and she becomes bankrupt, he is entitled to rank for dividend *pari passu* with her other creditors, while the wife who lends or entrusts money to her husband is not, in the event of his bankruptcy, entitled to rank for dividend, until after all his other creditors for value have been satisfied.

Provisions of the Bankruptcy Act, 1883.

The Bankruptcy Act, 1883 (s), enacts that, subject to the provisions of the Act, as amended by sect. 1 of the Preferential Payments in Bankruptcy Act, 1888 (t), all debts proved in the bankruptcy shall be paid *pari passu*. Under a precisely similar clause in the Act of 1869 (u), it was held that in a bankruptcy creditors on voluntary bonds or covenants were entitled to receive dividends *pari passu* with creditors for valuable consideration (x).

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| (q) <i>May, In re</i> (1890), 45 Ch. D. | sub-s. 4. |
| 499. | (t) 51 & 52 Vict. c. 62. |
| (r) <i>Leng, In re</i> , (1895) 1 Ch. 652, | (u) 32 & 33 Vict. c. 71, s. 32. |
| C. A. | (x) <i>Exp. Pottinger</i> (1878), 8 Ch. D. |
| (s) 46 & 47 Vict. c. 52, s. 40, | 621. |

Hence the question arises, What is the effect of this section and decision upon the position of a married woman who has made a loan or entrusted property to her husband? Ch. XI. s. 2.

By the Married Women's Property Act, 1882, money or other property lent or entrusted by the wife to the husband becomes, on his bankruptcy, assets of his estate, with the right to her to rank against that estate for payment after creditors for *valuable* consideration. By the Bankruptcy Act, 1883 (y), and the decision in *Ex parte Pottinger* (z), voluntary creditors and creditors for value rank equally against the debtor's estate. It therefore seems that the husband's voluntary creditors are entitled to be paid out of his estate, which includes money or property lent or entrusted to him by his wife for the purposes of his business, *pari passu* with his creditors for value, in priority to any repayment to the wife, although such a distribution would, it seems, be contrary to the intention of this section of the Married Women's Property Act, 1882, which points to repayment to the wife after creditors for value only have been satisfied.

Where a married woman, a creditor of her husband, entitled to rank for repayment.

Even before the Act of 1882, a married woman, so far as her separate property, when unfettered by any restraint on anticipation, was concerned, might make contracts respecting it, and those contracts, if valid, would bind it, or, if invalid, would be set aside precisely on the same principles which prevailed in cases where the contracting parties on both sides were free from disabilities (a). It was said in *The London Chartered Bank of Australia v. Lemprière* (b), that, given the relation of debtor and creditor, in equity all the consequences of such relation would appear to follow, just as if there were no coverture in the case. But no personal liability in respect of such contracts or engage-

Before the Act of 1882 a married woman might contract with reference to her separate property.

(y) 46 & 47 Vict. c. 52, s. 40, sub-s. 4.

(z) *Exp. Pottinger* (1878), *ubi supra*.

(a) *M'Henry v. Davies* (1870), L. R., 10 Eq. 88. See also *Latouche v. Latouche* (1865), 34 L. J., Ex. 85. As to the liability of the wife's

separate estate for calls on shares, see *In re Leeds Banking Company* (1867), L. R., 3 Eq. 781; *Butler v. Cumpston* (1868), L. R., 7 Eq. 16; *Warne v. Routledge* (1874), L. R., 18 Eq. 497; *Wainford v. Heyl* (1875), L. R., 20 Eq. 321.

(b) (1873), L. R., 4 P. O. 572, 596.

Ch. XI. s. 2.
Extent of her
power to
contract and
bind separate
property.

ments was incurred by a married woman, and no judgment could be recovered against her personally (c). The power of contracting possessed by her was not a power of entering into a personal contract, but a power of contracting so as to bind her separate property (d). Her *person* was not liable, and the relation of debtor and creditor existed only in this sense, that the creditor could obtain a judgment against the separate property, and obtain payment out of it. The contracting a debt by a married woman having separate property did not prevent her disposing of that separate property any more than the contracting a debt prevented a man from disposing of any part of his property; and therefore, as a man might alienate his property until it was bound by execution, so a married woman having separate property would not be restrained at the suit of a creditor from alienating that property until it was bound by judgment (e). And further, the power of contracting possessed by a married woman having separate property was merely a power to contract a debt to be paid out of that separate property, and not in respect of any separate property which she might acquire after the date of the contract; but in cases governed by the Married Women's Property Acts, 1882 and 1893, this limitation has been abolished, and the power of contracting has also been placed on a wider basis.

A married woman has also the same power over the savings out of her separate property as over the separate property itself (f).

This power over her savings, which was established by the Courts of Equity, was specially recognized by the Act of 1870, and necessarily follows from the provisions of the Act of 1882.

(c) *Davis v. Ballenden* (1882), 46 L. T. 797; *Bursill v. Tanner* (1884), 32 W. R. 827.

(d) *Wainford v. Heyl* (1875), L. R., 20 Eq. 321; *Warne v. Routledge* (1874), L. R., 18 Eq. 497; *M'Henry v. Davies* (1870), L. R., 10 Eq. 88. See also *Latouche v. Latouche* (1865), 34 L. J., Ex. 85; *Re Leeds Banking Company* (1867), L. R., 3 Eq. 781; *Butler v. Cump-*

ston (1868), L. R., 7 Eq. 16.

(e) *Wainford v. Heyl* (1875), L. R., 20 Eq. 321; *Robinson v. Pickering* (1881), 16 Ch. D. 660; *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454; *Johnson v. Gallagher* (1861), 3 De G., F. & J. 494.

(f) *Muggeridge v. Stanton* (1859), 1 De G., F. & J. 107; *Butler v. Cumpston* (1868), L. R., 7 Eq. 16.

After some conflicting decisions, it was finally settled that not only the bonds, bills and promissory notes, but also the general engagements of a married woman, whether in writing or verbal (except, of course, as to the latter, in cases coming within the Statute of Frauds (*h*)), would affect her separate property; but, in order to bind the separate property, it should appear that the general engagement was made with reference to and upon the faith or credit of that property (*i*), or, from the nature of the contract, must have been intended to be so referred (*k*); and whether this was so or not was a question for the judgment of the Court upon all the circumstances of the case; but she was not liable for general contracts, which from their nature could not be referred to her separate property.

Ch. XI. s. 2.

When separate property bound by general engagements.

Nor, until the passing of the Trustee Act, 1893, could the interest of a married woman in separate estate be attached by the trustees thereof as an indemnity for a breach of trust committed by them (with her approval), some overt act, and not mere acquiescence, being necessary to bind her interest therein (*l*).

It is now, however, provided by sect. 45 (1) of the Trustee Act, 1893 (*m*), that—

“Where a trustee commits a breach of trust at the instigation or request, or with the consent in writing of a beneficiary, the High Court may, *if it thinks fit*, and NOTWITHSTANDING THAT THE BENEFICIARY MAY BE A MARRIED WOMAN ENTITLED FOR HER SEPARATE USE AND RESTRAINED FROM ANTICIPATION, make such order as to the Court seems just, for impounding all, or any part of, the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him” (*n*).

It was also ultimately settled that the general engagements of a married woman, contracted on the credit of her separate property, were not in the nature of appointments of or charges

(*h*) 29 Car. 2, c. 3; *Burke v. Tuile* (1860), 10 Ir. Ch. Rep. 467.

(*i*) *Johnson v. Gallagher* (1861), 3 De G., F. & J. 494.

(*k*) *Wainford v. Heyl* (1875), L. R., 20 Eq. 321, 324. See *Warne v. Routledge* (1874), L. R., 18 Eq. 497.

(*l*) *Sawyer v. Sawyer* (1885), 28 Ch. D. 595.

(*m*) 56 & 57 Vict. c. 53.

(*n*) *Griffiths v. Hughes*, (1892) 3 Ch. 105; *Bolton v. Curre*, (1895) 1 Ch. 544; and see *Lewin on Trusts*, 11th ed., p. 1154 *et seq.*

Ch. XI. s. 2.

on her separate property, but constituted only the relation of debtor and creditor, with a right for the creditor to go against the particular fund (*o*).

When *corpus* bound where wife had life interest followed by power of appointment.

Questions formerly arose as to whether the general engagements of a married woman affected the *corpus* of property, where the married woman had a life interest with a general power of appointment, followed by a gift over in default of appointment. The cases were twofold—(1) where the power had been exercised; and (2) where it had not been exercised. A limitation to a married woman for her separate use, without any restraint on anticipation, followed by a general power of appointment by deed or will, with a limitation in default of appointment to her executors and administrators, was held to vest the entire *corpus* in her for all purposes, as fully as a similar limitation to a man would vest it in him (*p*); and in such a case, whether the power were exercised or not, the *corpus* of the property was, and, of course, still is, liable to satisfy the debts and general engagements of a married woman.

The result has been decided to be the same, where the power of appointment was by deed or will, followed by a gift over in default of appointment, and the power was exercised by will (*q*).

But before the Act of 1882, where the power of appointment was by will only, and the power had been exercised, the decisions were conflicting as to whether the *corpus* of the property affected by the exercise of the general power was rendered separate property, so as to be liable to the claims of creditors (*r*).

Effect of the Act of 1882

The doubt, however, has been settled by the 4th section of the Married Women's Property Act, 1882, which provides that the

(*o*) Per James, L. J., in *Robinson v. Pickering* (1881), 16 Ch. D. at p. 663; *Owens v. Dickinson* (1840), Cr. & Ph. 48; *National Provincial Bank v. Thomas* (1876), 24 W. R. 1013.

(*p*) See *The London Chartered Bank of Australia v. Lempière* (1873), L. R., 4 P. C. 572, 595.

(*q*) *Heatley v. Thomas* (1809), 15

Ves. 596; *The London Chartered Bank of Australia v. Lempière* (1873), L. R., 4 P. C. 572.

(*r*) *Allen v. Papworth* (1731), 1 Ves. sen. 163; *Hulme v. Tenant* (1778), 1 Bro. C. C. 15; *Socket v. Wray* (1792), 4 Bro. C. C. 483; *Heatley v. Thomas* (1809), 15 Ves. 596; *Hughes v. Wells* (1851), 9 Hare, 749; *Vaughan v. Vander-*

execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act (s); so that now in both these cases the exercise of the power by a married woman has the same effect as the exercise of a similar power by a man.

Ch. XI. s. 2.
upon the execution of general power by married woman.

In cases in which the power of appointment is followed by a gift over in default of appointment, then, whether the power be by deed or will, or by will only, and the power is not exercised, the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment (t).

In all cases occurring after 31st December, 1882, the questions as to general engagements above discussed cannot arise, as it is provided by the Act of 1882 that every contract entered into by a married woman shall be deemed to be a contract entered into with respect to and to bind her separate property, unless the contrary be shown.

A contract binding on the separate property of a married woman was not, of course, terminated by the death of her husband, but the creditor's remedy was not, in the absence of a new contract, extended so as to give him a right of action against the wife personally.

In accordance with this principle, the case of *Stead v. Nelson* (u) was decided. There a husband and wife undertook for valuable consideration, by writing under their hands, to execute a mortgage of her separate estate. The husband died. Lord Langdale held that the surviving wife was bound by the agreement. During the coverture she had in equity the same power over the estate as she would have had if she had been a

Decree against widow upon an agreement made while under coverture.

Stegen (1853), 2 Drew. 165; *Johnson v. Gallagher* (1861), 3 De G., F. & J. 494; *London Chartered Bank of Australia v. Lemprière* (1873), L. R., 4 P. C. 572; *Mayd v. Field* (1876), 3 Ch. D. 587; *Godfrey v. Harben* (1879), 13 Ch. D. 216; *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454, 466; *Hodges v. Hodges* (1882), 20

Ch. D. 749.

(s) 45 & 46 Vict. c. 75, s. 4; and see *Hughes, In re*, (1898) 1 Ch. 529, C. A.

(t) *Nail v. Punter* (1832), 5 Sim. 555. As to what constitutes an exercise of the power, see *Hodgson, In re*, (1899) 1 Ch. 666.

(u) (1839), 2 Beav. 245.

Ch. XI. s. 2. *feme sole*. She, therefore, had power to enter into this agreement, which his Lordship held must be specifically performed.

In *Aylett v. Ashton* (x), Lord Cottenham (then Sir Charles C. Pepys, M. R.) said that, although a *feme covert* had power and the Court had jurisdiction over the rents and profits of her separate property, no case had given effect to her contracts against the *corpus* of her separate estate. This distinction, though suggested by Lord Thurlow (y), and apparently adopted by Lord Eldon (z), can only be explained by the circumstance that the separate use was in those days usually confined to the life interest of the wife; and that even if the fee simple were settled to her separate use, she was not, in the absence of an express power, considered to be capable of disposing of it, except to the same extent as if it were not separate property.

Her liability
for breach of
trust.

Upon the principle that a married woman can dispose of her separate estate, she will render it liable by concurring with her trustees in a breach of trust (a).

(x) (1835), 1 Myl. & Cr. 105, at p. 112.

(y) *Hulme v. Tenant* (1778), 1 Bro. C. C. 16.

(z) *Nantes v. Corrock* (1802), 9 Ves. 182, 189.

(a) 56 & 57 Vict. c. 53, s. 45 (1); and see *ante*, p. 365; and *Crosby v. Church* (1841), 3 Beav. 485. See also *Brewer v. Swirles* (1854), 2 Sm. & G. 219, and cases collected in 1 White & Tudor, L. C., 7th ed., p. 691.

SECTION III.

THE RESTRAINT UPON ANTICIPATION.

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The wife, as we have seen, has not only the privilege of enjoying, but the unrestrained freedom of alienating, her separate property. Restraint upon anticipation.

With a perfect liberty of disposal, this inconvenience arose under the old law: She was still open to the operation of her husband's personal influence; and might be persuaded to part with, or to charge, her separate property, even against her better judgment. Cases constantly occurred in which, yielding to his authority, or complying with his entreaties, she defeated the provision intended for her. Insomuch that the mere limiting of property in this manner proved often a futile operation; and the separate use was in danger, except where the wife had great firmness, of becoming little more than a name; until Lord

Chap. XI. s. 3. Thurlow, in *Miss Watson's case* (b), gave sanction to the salutary clause which restrains anticipation, and takes from the wife the power of bringing ruin upon herself.

Its necessity
as guard of
the separate
use.

Its useful
working.

Though in
form a fetter,
in fact a
benefit to the
wife.

By this clause, the separate use is not only made secure and indefeasible, but is further prevented from becoming (what it otherwise might be) the cause of matrimonial contention; for the husband knowing that his wife's hands are tied up, forbears to urge impossibilities. In every point of view, therefore, this clause deserves the commendation which the wise have bestowed upon it. And, though in form a fetter upon the wife, it is, in effect, of the greatest benefit to her. For, suppose a gift made to her separate use without prohibiting alienation; the Court in such a case has no jurisdiction to award a settlement. The husband, by exercising his marital influence, may prevail on her to renounce the separate use. He thus gets access to the whole of the property; and she will then be in a worse predicament than if the donor had bestowed it on her generally.

The restraint
applicable to
all kinds of
property.

A restraint against anticipation may be imposed, whether the subject of the gift be real or personal property, and whether it consist of an estate in fee, or only for life (c). It has been held that a capital sum, decreed by the Court to be expended in the purchase of an annuity for the benefit of a married woman, acceded to her personal estate, upon her decease before the negotiations for such purchase were completed (d).

Income-pro-
ducing fund.

Where a fund producing income—as, for example, a sum of consols—is given absolutely to a married woman, and the gift is accompanied by a restraint on anticipation, that restraint ties up the income of the fund, so as to prevent, during coverture, the alienation of the *corpus* (e). But if the gift consists of a sum of money, from which, of course, no income arises, the restraining clause may be rejected, and the money paid to the married woman on her separate receipt (f). So also in a bequest

(b) See *Pybus v. Smith* (1791), 3 Bro. C. C. 340; *Jackson v. Hobhouse* (1817), 2 Mer. 483, where Lord Eldon gives an account of the introduction of the clause against anticipation.

(c) *Baggett v. Meux* (1846), 1

Phil. 627; 1 Coll. 138; *Re Ellis' Trusts* (1874), L. R., 17 Eq. 409.

(d) *Ross, In re*, (1900) 1 Ch. 162.

(e) *Re Ellis' Trusts* (1874), L. R., 17 Eq. 409; *Re Benton* (1881), 19 Ch. D. 277.

(f) *Re Croughton's Trusts* (1878),

“without power of anticipation,” if no trustees be appointed (*g*). Chap. XI. s. 3.
 The application of the one or the other of these rules to a residuary bequest depends upon the condition in which the property is found; thus, stock of the testator, being an income-producing fund, will not, but cash, not being such, will, under these circumstances, be paid to the married woman (*h*). If, however, it is the duty of the trustees to invest the trust funds, and pay the income to a married woman without power of anticipation, they cannot pay over to her during coverture a sum of cash which is uninvested in their hands (*i*). It seems that there is no power to restrain *alienation* as distinguished from *anticipation* (*k*).

Another instance in which the attempted restraint is ineffectual, is where the result of applying it would be to tie up the property beyond the limits allowed by the rule against perpetuities. Thus, where a power of appointment conferred by a marriage settlement was exercised, by limiting the share of a married daughter to trustees upon trust for her separate use for life, without power of anticipation, and after her decease to her appointees by deed or will, and in default to her executors or administrators, the restraint was rejected, and the appointment was upheld (*l*). And where there was a gift by will to a class, which might include persons not born in the lifetime of the testator, a general clause restraining anticipation has been held to be invalid (*m*). In a recent case it has, however, been held that such a restraint was valid as to the shares of those members of the class born in the testator's lifetime, though void as to the shares of those born afterwards (*n*). But, if the class has been

Rule against perpetuities.

8 Ch. D. 460; *Re Taber's Estate* (1878), 30 W. R. 883.

(*g*) *Russell v. Lawder*, (1904) 1 Ir. R. 328.

(*h*) *Re Clarke's Trusts* (1882), 21 Ch. D. 748.

(*i*) *Re Benton* (1881), 19 Ch. D. 277. See also *Re Bown* (1884), 53 L. J. Ch. 881; 20 S. J. 690; reversing 49 L. T. 165.

(*k*) See *Re Croughton's Trusts* (1878), 8 Ch. D. 460; *Re Bown*

(1884), *supra*; *Re Ellis' Trusts* (1874), L. R., 17 Eq. 409.

(*l*) *Fry v. Capper* (1853), Kay, 163; *Armitage v. Coates* (1865), 35 Beav. 1; *Re Teague's Settlement* (1870), L. R., 10 Eq. 564; *Re Cunningham's Settlement* (1871), L. R., 11 Eq. 324; *Buckton v. Hay* (1879), 11 Ch. D. 645.

(*m*) *Re Michael's Trusts* (1877), 46 L. J., Ch. 651.

(*n*) *Ferneley's Trusts, In re*, (1902) 1 Ch. 543.

Chap. XI. s. 3. ascertained by the death of the parent, or by the mother passing the age of child-bearing, before the instrument comes into operation, the restraint on anticipation will be valid (o).

In *Buckton v. Hay* (p), the late Master of the Rolls, Sir G. Jessel, reluctantly followed the previous decisions, saying, however, that "not one of the judges appear to me to have considered the real point, namely, whether a restriction on alienation, such as there is in the present case, is valid." The view which he seems to have been disposed to take was that the restraint on anticipation, which is a purely equitable creation, ought to have been permitted to infringe upon the rule against perpetuities, in favour of married women, to enable them to enjoy their property, as it had already infringed the general law against inalienable property.

Effect of
Conv. Act,
1881, s. 39.

It is submitted that this subject must, to some extent, be reconsidered, having regard to the alteration introduced by the Conveyancing and Law of Property Act, 1881 (q), which, by the 39th section, enables the Court, when it appears to be for the benefit of a married woman, to bind her interest in any property where she is restrained from anticipation. The exercise of this power by the Court is, however, purely discretionary (r). And where a married woman is a tenant for life, or has the powers of a tenant for life under the Settled Land Act (s), a restraint on anticipation does not prevent her from selling the property under the powers of that Act (t). There would thus seem to be good reason for maintaining that, as the object of the rule against perpetuities was to establish liberty of alienation, a restraint on anticipation which does not wholly prevent alienation cannot be regarded as an infringement of the rule.

Married
Women's
Property Act,
1882.

Modern legislation has not interfered with existing restrictions on anticipation, and has not affected the right to attach in future such a restriction to the enjoyment of property by a

(o) *Cooper v. Laroche* (1881), 17 Ch. D. 368. See also *Herbert v. Webster* (1880), 15 Ch. D. 610; and *Millward, In re* (1902), 87 L. T. 476.

(p) (1879), 11 Ch. D. 645.

(q) 44 & 45 Vict. c. 41.

(r) *Little, In re* (1889), 40 Ch. D. 418, C. A. As to when it will be exercised, see Seton, 6th edit., vol. 2, p. 911.

(s) 45 & 46 Vict. c. 38.

(t) Sect. 61, sub-s. 6.

married woman, except in the sole case where a woman makes a settlement of her own property with a restraint on anticipation. Chap. XI. s. 3.

By the 19th section of the Married Women's Property Act, 1882, it is enacted as follows:—

“Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, or agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a WOMAN'S OWN PROPERTY to be made or entered into by herself SHALL HAVE ANY VALIDITY AGAINST DEBTS CONTRACTED BY HER BEFORE MARRIAGE, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.”

The effect of the first clause of this section (19) as construed by the Courts is:— Sects. 5 and 19
as construed
by the Courts.

- (a) To prevent sect. 5 of the Married Women's Property Act, 1882, from interfering with any settlement which would have bound the property if the Act had not been passed (*u*);
- (b) So to modify sect. 2 of the Act as to prevent it from depriving the persons interested under a settlement, of the property of a married woman, of any benefit to which they would have been entitled, if sect. 2 had not been enacted (*x*).

The effect of the latter part of sect. 19 is to prevent a judgment against a married woman (in respect of an ante-nuptial debt) from being enforced against her separate property subject to a restriction against anticipation, unless the restriction upon anticipation is contained in a settlement, or agreement for a settlement, of her own property, made or entered into by herself (*y*).

(*u*) *Hancock v. Hancock* (1888), 38 Ch. D. 78. *rick*, (1893) 2 Ch. 307.

(*x*) *Buckland v. Buckland*, (1900) 2 Ch. 535; *Stevens v. Trevor-Gar-* (*y*) *Birmingham Excelsior Money Society v. Lane*, (1904) 1 K. B. 35, C. A.

Chap. XI. s. 3. Before the Married Women's Property Act, 1882 (z), a woman about to marry could settle her property with a restraint on anticipation (a), but it seems that such a restraint did not prevent ante-nuptial creditors from obtaining payment out of the fund (b).

A single woman cannot be restrained.

As the separate use cannot exist but in the married state, so neither can the restraint upon anticipation. There is no form of limitation whereby a single woman can be prevented from squandering her income, or dissipating her means (c). If, then, property becomes vested in her while discover, although the instrument may express that the gift is to her separate use and subject to restraint upon anticipation, she may, nevertheless, dispose of it absolutely; because property cannot be given to a *feme sole*, any more than to a man, without being subject to the incidents which property implies; and one of the first of these is the unlimited power of alienation (d).

But when she marries the restraint will operate.

But if she marry without having indicated an intention of discharging the property from the restraint upon anticipation, it will thereupon attach and become effective.

The separate use no longer, as a general rule, depends upon limitation, but arises by statute; and its connection with the restraint on anticipation is therefore less intimate than it was before the recent Act. Formerly, a spinster entitled to property limited to her separate use without power of anticipation could not upon her marriage, unless she executed a formal settlement, reject the restraint while retaining the separate use. It is now

(z) 45 & 46 Vict. c. 75.

(a) *Hastie v. Hastie* (1876), 2 Ch. D. 304.

(b) *Sanger v. Sanger* (1871), L. R., 11 Eq. 470; *London and Provincial Bank v. Bogle* (1878), 7 Ch. D. 773; *Bursill v. Tanner* (1884), 32 W. R. 827.

(c) *Re Young's Settlement* (1854), 18 Beav. 199. In this respect she stands on the same footing as a man; and what his position is, in this respect, may be collected

from Lord Eldon's decision in *Brandon v. Robinson* (1811), 18 Ves. 429; 1 Rose, 197. See *Gilchrist v. Cator* (1850), 1 De Gex & Sm. 188.

(d) In France it is provided by sect. 513 of the Code Napoleon, that "Prodigal persons may be prohibited from using, transacting, borrowing, receiving a moveable capital and giving discharge for it, aliening and incumbering their property with mortgages, without the assistance of an adviser to be named to them by the tribunal."

otherwise, and it may be presumed that slight circumstances will be held sufficient to manifest an intention on her part to cast off the fetter (*e*). Chap. XI. s. 3.

The moment, however, that she again becomes single, the separate use, and the restraint on anticipation, will both cease, though still capable of revival upon subsequent marriage, and extinction upon subsequent discovery, *toties quoties* (*f*).

Like the separate use itself (of which it is the guard), the restraint upon anticipation requires for its establishment no technical form of words. But the intention must be clear (*g*). What words will restrain anticipation.

It is not necessary (as seems to have been thought by some) that express negative words should be introduced in the receipt clause (*h*). The restraint may be effectually imposed by an English testator upon a married woman domiciled in a country whose laws would refuse to recognize its validity (*i*).

In *Brown v. Bamford* there was a bequest to trustees, to pay the income of property to such person or persons as a married woman should, by writing under her hand, but not by way of anticipation, appoint; and in default of such appointment into her proper hands, for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges. Here it will be observed the restraint on anticipation was in terms limited to her exercise of the power; but Lord Lyndhurst decided that the restraint applied to an assignment as well as to an appointment, observing that it could not reasonably be supposed that the testator would have been so careful, as he evidently was, to exclude *one* mode of anticipation, and at the same time mean to leave the property subject to alienation in *another* form (*k*).

(*e*) See as to what acts while discovery amounted to a determination of the trust for the separate use, *Wright v. Wright* (1862), 2 J. & H. 647; *Mayd v. Field* (1876), 3 Ch. D. 587.

(*f*) *Tullett v. Armstrong* (1839), 1 Beav. 1; S. C. on appeal, 4 Myl. & Cr. 377; *Scarborough v. Borman* (1839), 1 Beav. 34; S. C. on appeal, 4 Myl. & Cr. 378; *Clarke v. Jaques*

(1838), 1 Beav. 36; *Dixon v. Dixon* (1838), 1 Beav. 40; *Hawkes v. Hubback* (1870), L. R., 11 Eq. 5.

(*g*) See *Smith, In re* (1884), 51 L. T. 501.

(*h*) *Harrop v. Howard* (1845), 3 Hare, 624; *Brown v. Bamford* (1846), 1 Phil. 620.

(*i*) *Peillon v. Brooking* (1859), 25 Beav. 218.

(*k*) *Brown v. Bamford* (1846),

Chap. XI. s. 8. A marriage settlement directed the trustees during the wife's life to receive the income of the settled property, when and as often as the same should become due, and to pay it to such person or persons as she might from time to time appoint, or to permit her to receive it for her separate use; and it declared that her receipts, or the receipts of any person or persons, to whom she might appoint the same, *after it should become due*, should be valid discharges for it. The Vice-Chancellor of England held that the wife was restrained from anticipation (*l*).

A gift of property to separate use, "but not to be sold or mortgaged," was held by Vice-Chancellor Wigram to be subject to this restraint (*m*). Nor is it possible during coverture for a married woman, restrained from anticipation, either by admission of liability, or by estoppel, or in any other way personally to get rid of the protection afforded by the restraint (*n*). It is, however, provided by sect. 39, sub-sect. 1, of the Conveyancing Act, 1881, that—

"Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property" (*o*).

Words insufficient for this purpose.

But a mere direction to pay income to the wife's separate use *from time to time*, will not restrain her from alienation (*p*). Similarly, where it is directed that her receipts *from time to time* shall be effectual discharges (*q*), or that the trustees shall pay the income into her own proper hands (*r*), the married woman possesses the power of alienation.

supra. See also *Moore v. Moore* (1844), 1 Coll. 54; *Harnett v. Macdougall* (1845), 8 Beav. 187.

(*l*) *Field v. Evans* (1846), 15 Sim. 375. See, however, comments on this case in *Baker v. Bradley* (1855), 2 Sm. & G. 531, 561; 7 De G., M. & G. 597.

(*m*) *Steedman v. Poole* (1847), 6 Hare, 193.

(*n*) *Lady Bateman v. Faber*, (1898) 1 Ch. 144, C. A.; *Lavender's Policy*, *In re*, (1898) 1 Ir. R. 175, C. A.

(*o*) And see *Paget v. Paget*, (1898) 1 Ch. 470, C. A.

(*p*) *Parke v. White* (1805), 11 Ves. 209, 222; *Clarke v. Pistor* (1778), 3 Bro. C. C. 347, n., and cited 568; *Glyn v. Baster* (1827), 1 You. & Jer., Exch. in Eq. 329.

(*q*) *Pybus v. Smith* (1791), 3 Bro. C. C. 340; *Witts v. Dawkins* (1806), 12 Ves. 501.

(*r*) *Sturgis v. Corp* (1806), 13 Ves. 190; *Browne v. Like* (1807), 14 Ves. 302; *Hovey v. Blakeman*, cited

A testator bequeathed a sum of consols to trustees, and directed that it "should remain during his wife's life, and be (under the orders of the trustees) made a duly administered provision for her, and the interest of it given to her on her personal appearance and receipt." It was held that these words were insufficient to impose a restraint on anticipation (s). Chap. XI. s. 3.

In *Acton v. White* (t), a testator devised a freehold estate to trustees in trust to pay the rents as the same should become due and payable into the hands of his wife, and not otherwise, for her life to her separate use: and he directed that the receipts of his wife alone, for what should be actually paid into her own proper hands, should be good discharges to his trustees. Sir John Leach held that the wife was not restrained from alienation; his Honor observing that the words were intended only to exclude the marital right, that is, to establish a separate use in the wife; but that they did not go the further length of "controlling the right of disposition which is incident to property."

In *Alexander v. Young* (u), stock was bequeathed to the separate use of a married woman for life, and after her decease to her appointee by deed or will, with a direction *that any appointment by deed should not come into operation until after her death*. This was held by V.-C. Wigram to be no restraint upon anticipation. If his Honor had not so decided, it might, perhaps, have been thought that the testator's intention was different (x).

The restraint upon anticipation is designed for the protection Effect of clause.

in *Wagstaff v. Smith* (1804), 9 Ves. 524.

(s) *Re Ross's Trusts* (1851), 1 Sim., N. S. 196.

(t) (1823), 1 Sim. & Stu. 429.

(u) (1848), 6 Hare, 393.

(x) Here may be mentioned the case of *Baker v. Newton* (1839), 2 Beav. 112, where a testator bequeathed to his daughter, a married woman, 25,000*l.* for her own absolute use, without liberty to sell or assign during her natural life. According to the report, Lord Langdale held that she took absolutely,

"with a restriction against alienation during life." The marginal note describes her as a *feme sole*, which she was not when the gift took effect. It must not be inferred from this, that a single woman can be restrained from anticipation. The decision really imports no more than that she took an absolute interest in the property bequeathed. It was urged that she took for life only. The case was not one of separate use; nor is it of much value, though somewhat startling on a first perusal. There is evidently an error in the report.

Chap. XI. s. 3. of married women, a protection which is extended to them even against their own fraudulent acts. Thus, where a married woman, concealing the restraint on anticipation, purported to mortgage the property, a charging order upon her next accruing dividend, which had been obtained by the mortgagee, was set aside, on the express ground that "in no case, and by no device could the restraint upon anticipation be evaded" (y).

Again, if at the time when a married woman enters into a contract in respect of her separate estate, that estate is bound by a restraint on anticipation, a subsequent discovery by divorce or death will not render either the *corpus* or income derivable therefrom liable to attachment in respect of such contract (z).

Nor, unless under very special circumstances, and then only with the consent of the Court, which will rarely be given, can a married woman, restrained from anticipation, either sanction, condone, or be held liable for, the commission of a breach of trust by the trustees of the settlement (a).

Not liable for
her breaches
of trust.

It is also well established that the income of a married woman, which is subject to the restraint, cannot be impounded to make good her breach of trust (b).

In *Clive v. Carew* (c), the property had belonged to the wife before her marriage, and consisted of (1) a valuable pearl necklace, which was settled as an heirloom; (2) other jewels and effects settled upon the wife absolutely for her separate use; and (3) certain freehold and leasehold lands, to the rents and profits of which the married woman was entitled for life for her separate use, without power of anticipation. The lady having

(y) *Stanley v. Stanley* (1878), 7 Ch. D. 589; and see *Jackson v. Hobhouse* (1817), 2 Mer. 483; *Arnold v. Woodhams* (1873), L. R., 16 Eq. 29; *Kenrick v. Wood* (1869), L. R., 9 Eq. 333; *Lady Bateman v. Faber*, (1898) 1 Ch. 144, C. A.

(z) *Barnett v. Howard*, (1900) 2 Q. B. 784, C. A. But see *contra*, *Clive v. Carew*, *infra*.

(a) *Bolton v. Curre*, (1895) 1 Ch.

544.

(b) *Clive v. Carew* (1859), 1 J. & H. 199; *Pemberton v. M'Gill* (1860), 1 Dr. & Sm. 266; *Wainford v. Heyl* (1875), L. R., 20 Eq. 321. A husband is, however, liable for any fraud or other tort (including breaches of trust) committed by his wife during coverture: *Earle v. Kingscote*, (1900) 2 Ch. 585.

(c) (1859), 1 J. & H. 199.

sold the necklace, the trustees filed a bill against the husband, the wife and the children of the marriage, praying that the Court would give such directions as might be necessary, with a view to recovering or replacing the necklace. It was decided that the jewels and effects, to which the wife was absolutely entitled, were liable to make good the value of the necklace, but that her interest in the property, limited to her separate use for life with restraint on anticipation, was not so liable during the existing coverture; and liberty was given to apply on its determination, "because," as the Vice-Chancellor remarked, "on that event happening, there may be a possibility of recouping the loss occasioned by this breach of trust." Chap. XI. s. 3.

In several cases (*d*) arrears of restrained income, which had accrued after the married woman's liability was incurred, have been applied in satisfaction of such liability. These decisions, however, are inconsistent with the case of *Pike v. Fitzgibbon* (*e*), which has, however, since been overruled by the Married Women's Property Act, 1882 (*f*). The effect of this Act is to render not only the separate property which a married woman is entitled to at the date of the contract, but also all separate property which she may *thereafter* acquire, liable to satisfy her contracts; and it is therefore perfectly clear that, as regards property not subject to a restraint on anticipation, a creditor of a married woman can reach all such property, whether acquired before, at, or after the date of the contract. Arrears of income.

The Married Women's Property Act, 1882 (*g*), specially provides that nothing in the Act contained shall interfere with or render inoperative any restriction against anticipation then attached, or to be thereafter attached, to the enjoyment of any property or income by a woman under any instrument. This enactment therefore preserves to the fullest extent the protection afforded by the usual clause restraining anticipation; the only exception (other than that effected by sect. 2 of the amending Act of 1893 (*h*)), and this is apparent rather than Married Women's Property Act, 1882.

(*d*) *Pemberton v. M'Gill* (1860),
1 Dr. & Sm. 266; *Claydon v. Finch*
(1873), L. R., 15 Eq. 266.

(*e*) (1881), 17 Ch. D. 454.

(*f*) 45 & 46 Vict. c. 75, s. 1 (5).

(*g*) Sect. 19.

(*h*) As to what constitutes a
"proceeding instituted" within

Effect of the
Act of 1882 on
restraint upon
anticipation.

Chap. XI. s. 3. real, being where the property, or any part thereof, becomes free from the restriction during the continuance of the coverture (i).

It is an obvious truism that the restraint on anticipation never affected income which had accrued due; so that under the old law, a creditor, whose debt had been incurred after such income had accrued due, could reach the accrued payments in satisfaction of his debt. But he could not in any way reach subsequent income, either before or after it had accrued due; for, as James, L. J., said, in *Pike v. Fitzgibbon* :—

“Twist it in any way you like, the conclusion which we are asked to arrive at is: that a married woman restrained from anticipation can anticipate. That is the result, if it is put into plain English, because whether it is done by deed or by letter, or by the creation of a debt which in the result operates to charge the property, it is an anticipation of the property, by which the lady deprives herself of something which she otherwise would receive. That this is anticipating her future income would seem to me to be too plain a proposition to be seriously contested” (k).

It is apprehended that this is a perfectly correct statement of the present law upon anticipation, and that in no possible way can a married woman bind her future income, which she is restrained from anticipating, or render herself liable to satisfy debts out of such income. It may also be mentioned, in this connection, that in a recent case (l) a married woman, possessing separate estate restrained from anticipation, having signed promissory notes maturing during coverture, successfully resisted the appointment of a receiver of the income derivable from her separate estate, although, subsequently to the death of her husband, judgment had been recovered against her in an action on the notes.

Income can-
not be
assigned until
receivable.

Although interest is for some purposes treated as accruing from day to day, a married woman restrained from anticipation is not able to assign the apportioned part of the current interest

the meaning of sect. 2 of the Married Women's Property Act, 1893, see *Nunn v. Tyson*, (1901) 2 K. B. 487.

(i) *Cox v. Bennett*, (1891) 1 Ch. 617, C. A.

(k) (1881), 17 Ch. D. 454, 459.

(l) *Brown v. Dimbleby*, (1904) 1 K. B. 28, C. A.

which has accrued due up to the date of assignment, but can only deal with the income, after it becomes payable under the provisions of the instrument which creates the trust (*m*). Chap. XI. s. 3.

Certain extra-judicial observations of Lord Justice Knight Bruce, in the case of *Derbshire v. Home* (*n*), have given some foundation for the opinion that "a clause against anticipation does not exempt a married woman from the ordinary consequences of lapse of time and acquiescence." Acquiescence, however, in the contemplation of the Courts, is merely evidence of a release; and where an express release would be inoperative, so, also, it is submitted, must be that constructive release, which is founded on delay or acquiescence. Acquiescence.

Whether a married woman, being a tenant for life, is restrained from anticipation or not, she cannot authorize trustees to commit a breach of trust by investing upon insufficient securities (*o*). There is, however, this difference between the two cases, namely, that if she is not restrained from anticipation, her income may be impounded to recoup the trust funds the loss which has been sustained; whereas, in the other case, it cannot be touched (*p*).

Notwithstanding the restraint on anticipation, the property may, in some cases, be dealt with or affected, either by the order of the Court or the acts of the parties. Thus, a married woman can, it seems, compromise an action, the subject-matter of which is property of this nature (*q*). The income may be applied, at all events, when there is an express power in the settlement, in reimbursing the trustees any costs and expenses which they may have properly incurred (*r*); and a solicitor may be declared, under 27 & 28 Vict. c. 127, s. 28, to be entitled to a charge for the costs of recovering or preserving such property (*s*). Compromise of action.

(*m*) *Re Brettle* (1864), 2 De G., 1893, applies.
J. & S. 79.

(*n*) (1853), 3 De G., M. & G. 80.

(*o*) *Davies v. Hodgson* (1858), 25 Beav. 177. And see *Sawyer v. Sawyer* (1885), 28 Ch. D. 595.

(*p*) If, however, the breach of trust be committed at her instigation, sect. 45 of the Trustee Act,

(*q*) *Wilton v. Hill* (1856), 25

L. J., Ch. 156; *Wall v. Rogers* (1869), L. R., 9 Eq. 58; *Heath v. Wickham* (1880), L. R., 5 Ir. 285.

(*r*) *D'Oechsner v. Scott* (1857), 24 Beav. 239.

(*s*) *Re Keane* (1871), L. R., 12 Eq. 115.

Chap. XI. s. 3. Moreover, it is expressly enacted by sect. 2 of the Married Women's Property Act, 1893, that—

“In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.”

Power of
barring
estate tail not
affected by
restraint.

Settled Land
Act, 1882.

The restraint on anticipation does not prevent a married woman from barring an estate tail, and acquiring a fee simple under the Act for the abolition of fines and recoveries (*t*), or from exercising the powers, including the power of sale, conferred by the Settled Land Act, 1882 (*u*). But in both these cases nothing is withdrawn from the settlement, as the restraint on anticipation attaches to the substituted property.

Conv. Act,
1881, s. 39.

It was formerly held (*x*) that the Court had no jurisdiction, even when it would have been eminently advantageous to the married woman, to loose this fetter of its own forging; but by the Conveyancing and Law of Property Act, 1881 (*y*), it is enacted that, notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order with her consent, bind her interest in any property.

In some of the earlier cases which came before the Court under this section, it seems to have been assumed that there was jurisdiction to remove the restraint altogether (*z*); but in a modern case before the Court of Appeal (*a*), it was pointed out that to remove the restraint was a very different thing from making a disposition binding the wife's interest; and the application for the conversion of the fund into an annuity for the wife was accordingly refused. This case must be taken as over-

(*t*) *Cooper v. Macdonald* (1877), 7 Ch. D. 288.

(*u*) 45 & 46 Vict. c. 38, s. 61 (6).

(*x*) *Robinson v. Wheelwright* (1856), 6 De G., M. & G. 535.

(*y*) 44 & 45 Vict. c. 41, s. 39.

(*z*) *Hodges v. Hodges* (1882), 20

Ch. D. 749; *Musgrave v. Sandeman* (1883), 48 L. T. 215.

(*a*) *Re Warren's Settlement* (1884), 52 L. J., Ch. 928; 49 L. T. 696. See also *Little, In re* (1889), 40 Ch.

D. 418, C. A.; *Tamplin v. Miller* (1882), 30 W. R. 422.

ruling *Hodges v. Hodges* (b), where the fund was applied in Chap. XI. s. 3. payment of the married woman's debts.

Where the property consists of a fund in Court, it will not be paid out except on the separate examination of the married woman (c).

SECTION IV.

PIN-MONEY.

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The wife's pin-money has several points of resemblance to her separate estate, and in some respects is but faintly distinguishable from it. Resembles separate use.

Pin-money may be defined as a provision for the wife's dress and pocket, to which there is annexed a duty of expending it in her "personal apparel, decoration, or ornament" (d); and any savings therefrom belong to the husband (e). Definition.

(b) (1882), 20 Ch. D. 749.

(c) *Musgrave v. Sandeman* (1883), *supra*. See, however, *Hodges v. Hodges* (1882), *supra*.

(d) Per Lord Langdale, *Jodrell v. Jodrell* (1845), 9 Beav. 45. Its amount, however, is occasionally so great as to suggest that something more is meant than a provision for dress, or pocket-money. Thus the marriage settlement of Mrs. Wellesley Pole secured her an income of 13,000*l.* a-year for pin-money. See 2 Russ. 1. And as to the duty of expending it in per-

sonal decoration, Lord St. Leonards (in his work on the Law of Property as administered by the House of Lords, p. 166) holds it to be a duty of imperfect obligation. Johnson says pin-money means an "allowance for the wife's private expenses *without account*." Besides personal decoration, its objects, it would appear, may be charities to the poor, and largesses to servants, or attendants. See *Howard v. Digby* (1834), 2 Cl. & Fin. 634, 658; 8 Bligh, 224.

(e) *Barrack v. M'Culloch* (1856),

Chap. XI. s. 4. In this respect it differs from separate property which, as we have seen (*f*), the wife enjoys as a *feme sole*, and subject to no duty or control in the mode of its application.

How it differs from separate use. Pin-money also differs from paraphernalia, inasmuch as it is enjoyed by the wife during coverture; whereas her right to paraphernalia does not arise till she has become a widow (*g*).

How from paraphernalia. It would seem that pin-money is generally understood to move from the husband. The law apparently conceives that the splendour of the wife's appearance contributes to his enjoyment (*h*); and she is to attire herself according to his rank, not her own. Therefore, if she permit her pin-money to run in arrear, it is said that, should she survive her husband, she will be entitled to demand only one year's arrear prior to his death (*i*).

When wife presumed to waive pin-money. Moreover, where the husband finds the wife in clothes and necessaries, such provision constitutes a bar to any arrears of pin-money incurred during the period when such clothing and necessaries were supplied by him (*k*).

If she survive entitled only to one year's arrear. It has even been decided by the House of Lords, that if she become insane, and so remain till her death, her personal repre-

Effect of her becoming insane.

3 K. & J. 110, at p. 114; *Mews v. Mews* (1852), 15 Beav. 529.

(*f*) See *ante*, p. 334.

(*g*) See *ante*, p. 124.

(*h*) Lord Brougham held, in *Howard v. Digby* (1834) (2 Cl. & Fin. 658, and 8 Bligh, 224), that pin-money is "a fund which the wife may be made to spend during the coverture by the intercession and advice, and at the instance of her husband." The husband may say to his wife, "If you do not dress yourself as you ought to do, what occasion have you for pin-money?" Again, his Lordship adds, "To be spared the eyesore of a wife appearing as misbecomes her station—that is the object of pin-money." Lord St. Leonards, however, in his work on the administration of the Law of Property by the

House of Lords, p. 166, says: "The wife's pin-money is *not* a fund which she may be made to spend during her coverture. She may recover, if she pleases, her pin-money annually, or at the times fixed by the settlement; and though she were a miser and a slattern, her husband would be without remedy. Nothing could strike more fatally at the peace of families than a doctrine which would enable a husband to coerce his wife in the expenditure of her pin-money, or call her to an account for its application."

(*i*) *Peacock v. Monk* (1750-1), 2 Ves. sen. 190; *Thrupp v. Harman* (1834), 3 Myl. & K. 513. See, however, *Ridout v. Lewis* (1738), 1 Atk. 269.

(*k*) *Fowler v. Fowler* (1738), 3 P. W. at p. 354.

sentatives will not be allowed *any* arrears, even although the pin-money were secured by an ante-nuptial settlement (*l*). Chap. XI. s. 4.

But the above limitation of arrears to twelve months applies only when the wife sues the husband or his executors. Consequently, where a receiver has been appointed, and he has received the rents or income of the property out of which the pin-money was to be payable, the limitation does not apply (*m*). Effect of appointment of receiver.

The object, in short, of pin-money is to enable the wife (without constantly appealing to her husband) to attire and deck herself in a style corresponding with his position in the world.

If the pin-money be secured by ante-nuptial settlement or articles, the misconduct of the wife, how flagrant soever, will not prevent the Court from enforcing her rights so secured (*n*). Wife's misconduct not necessarily a bar to the claim.

It was formerly the practice to secure the payment of the wife's pin-money, by limiting the family estates in the marriage settlement to trustees for a long term of years, called the pin-money term, the trusts of which were to raise an annuity for the wife during coverture. But it is submitted that, having regard to the provisions of the Married Women's Property Act, 1882, the term of years is no longer necessary, and that it will for the future be equally efficacious to limit a legal rent-charge of the requisite amount to the wife during the coverture without power of anticipation (*o*). She will, under the Conveyancing and Law of Property Act, 1881 (*p*), be thereupon entitled to all the remedies for the recovery of the rent-charge, which were formerly available under the limitations of the settlement. How secured.

(*l*) See Lord Chancellor Brougham's speech in *Howard v. Digby* (1834), 2 Cl. & Fin. 651, and 8 Bligh, 224.

(*m*) *Foss v. Foss* (1864), 15 Ir. Ch. R. 215; *Edgeworth v. Edgeworth* (1865), 16 Ir. Ch. R. 348.

(*n*) *Moore v. Moore* (1737), 1 Atk. 272. See *ante*, p. 274, as to settlements in pursuance of ante-nuptial articles.

(*o*) See Key & Elphinstone's *Precedents*, 8th ed., vol. ii., p. 596.

(*p*) 44 & 45 Vict. c. 41, s. 44.

SECTION V.

THE WIFE'S EARNINGS AND SEPARATE TRADING.

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Formerly the earnings of the wife might be her separate property.

Formerly the husband was, by the common law, entitled to the fruits of his wife's labour. But, independently of the statutory protection of recent years, the earnings of married women were in many cases preserved for their benefit by the Court of Chancery under the doctrine of separate use. For, if a husband agreed with his wife that she should be at liberty to carry on a separate trade or business,—and such an agreement might be established by acts, as well as by the most formal instrument,—the husband was in equity converted into a trustee for the wife, not only of the profits which she made, but of the stock-in-trade, capital and effects employed in the business (*q*). In an early case (*r*), a husband allowed his wife to dispose and make profit of the butter, eggs, poultry, pigs, fruit, and other trivial matters arising from his farm for her separate use, calling it pin-money ;

(*q*) *Ashworth v. Outram* (1877), 5 Ch. D. 923. And see the cases there cited. (*r*) *Slanning v. Style* (1734), 3 P. Wms. 334.

and he had borrowed from her 100*l.*, to make up the purchase-money of an estate. Although the agreement was post-nuptial, and not evidenced by any writing, the Lord Chancellor (s) decreed that the widow was entitled to prove as a creditor for the 100*l.*, observing that "the courts of equity have taken notice of and allowed *feme coverts* to have separate interests by the husbands' agreements" (t). Chap. XI. s. 5.

The question was, whether the business was carried on solely by the wife, or jointly by her and her husband, and was, as it is now under statute, a question of fact. If it was the sole business of the wife, the trade property was not distributable under her husband's *fiat*; but if it was a joint business, or if the husband participated in its benefits, then the trade property was affected by his obligations, and he was held liable for goods supplied for the purposes of the business (u).

Such an agreement between the husband and wife might not in some cases have been entered into, or it might be difficult to establish, and for these the Act of 1870 provided a statutory Act of 1870. remedy. By the first section it was enacted that—

"The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property" (x).

The case of *Ashworth v. Outram* (y) was decided as much upon the general principles of Courts of Equity as under the special provisions of the Married Women's Property Act, 1870. Ashworth v. Outram.

(s) Lord Talbot.

Ch. D. 416.

(t) As to gifts from husband to wife, see *Walter v. Hodge* (1818), 2 Swanst. 92; *Mews v. Mews* (1852), 15 Beav. 529; *Hoyes v. Kindersley* (1854), 2 Sm. & G. 195; *Baddeley v. Baddeley* (1878), 9 Ch. D. 113; *Fox v. Hawks* (1880), 13 Ch. D. 822; *Re Breton's Estate* (1881), 17

(u) *Jarman v. Woollaton* (1790), 3 T. R. 618; *Petty v. Anderson* (1825), 3 Bing. 170; *Barlow v. Bishop* (1801), 1 East, 432; *Cotes v. Davis* (1807), 1 Campb. 485.

(x) 33 & 34 Vict. c. 93, s. 1.

(y) (1877), 5 Ch. D. 923.

Chap. XI. s. 5. The facts were shortly as follows:—In the year 1855, Sarah Outram, then Sarah Fairbank, spinster, became the housekeeper of Thomas Outram and manager of part of his farming business. He shortly afterwards engaged to marry her, but the marriage did not take place till 1874. Sarah Fairbank, with the knowledge and consent of Thomas Outram, in 1861 commenced the business of fruit preserving, which ultimately developed into a profitable wholesale business. At the date of the marriage there was a considerable balance at her bankers, and a large stock of preserves on the premises of her husband. She continued after the marriage to carry on the preserving business in precisely the same way as before, even to the extent of retaining her maiden name upon the pots of preserves. Within a few months of the marriage Thomas Outram died intestate, whereupon his widow claimed to retain the business as her own, and refused to take out administration, which was granted to one of his sisters; and an action was commenced for the administration of his estate.

In this action it was decided that the capital and stock-in-trade of the business belonged to the widow, and were not part of the husband's estate. This decision might possibly have been the same, even if the Married Women's Property Act, 1870, had not been passed; and, indeed, Baggallay, L. J., founded his judgment on general principles of equity, and not upon the provisions of the statute. But, on the other hand, Lord Coleridge, C. J., and James, L. J., seem to have relied principally upon the section to which reference has been made.

Power of married woman to sue for recovery of separate property.

A married woman was also empowered by that Act (z) to maintain an action in her own name for the recovery of any wages, earnings, money and property by the Act declared to be her separate property, and was declared to be entitled to the same remedies, civil and criminal, for its protection, as if she were an unmarried woman; but these remedies extended no further, and did not give a married woman any general right to contract or to sue in her own name for damages for breach of contract.

These provisions have now been repealed, but are re-enacted

(z) 33 & 34 Vict. c. 93, s. 11.

in substantially identical terms by the Act of 1882 (a). But it must be borne in mind that the limitation above alluded to, as subsisting under the Act of 1870, no longer exists, for now a married woman can enter into contracts, and sue, and be sued, in her own name as if she were a *feme sole*. Under the Act of 1882, as well as under the Act of 1870, the question, whether the circumstances of the particular case amount to a separate trading, is one of fact for the jury; but in cases to which the Acts of 1882 and 1893 apply, it is presumed that much slighter evidence than was formerly necessary will suffice to establish this question in favour of the wife, especially when the business belonged to her before marriage. The mere fact of the husband living in the house at the time when the business is being separately carried on by the wife, does not deprive the wife of the protection afforded by the Act (b). Among the almost conclusive indications of "separate trading" may be mentioned the retention of the woman's maiden name in the business, and the existence of a separate banking account in her name (c). Separate trading was held to have subsisted, where the husband having been removed to an infirmary, the wife, with the help of friends, continued the business in which he had been engaged, and the husband, on his return, did not interfere with the business (d). It was also so held, where the wife kept a private hotel (e); but where the husband acted in the business as the agent of the wife, or the wife as manager for the husband, it was held that she was not carrying on a separate trade (f). But a married woman does not "carry on business separately from her husband" within the meaning of sect. 1, sub-sect. 5, of the Married Women's Property Act, 1882, merely because she has a personal interest in the business which is being carried

What will constitute separate trading.

(a) 45 & 46 Vict. c. 75, ss. 2, 5, 12, 22. 573; *Re Whittaker* (1882), 21 Ch. D. 657.

(b) *Lovell v. Newton* (1878), 4 C. P. D. 7. And see *Worsley, In re* (1900), 8 Man. 8, C. A.

(c) *Ashworth v. Outram* (1877), 5 Ch. D. 923. See further, as to what constitutes separate trading, *Exp. Shepherd* (1879), 10 Ch. D.

(d) *Lovell v. Newton* (1878), 4 C. P. D. 7.

(e) *Wood v. Wood* (1871), 19 W. R. 1049.

(f) *Re Whittaker, supra*; *Laporte v. Cosstick* (1874), 23 W. R. 131.

Chap. XI. s. 5. on by the husband and wife jointly. The true test of separate trading is, whether or no the husband could have called upon his wife to account to him for the profits, and if he could not do so the business is the wife's and she is trading independently of her husband (*g*).

When the wife, after the death of her husband, claims certain property as pertaining to her separate trade, her evidence must be corroborated, or else she can obtain no relief. Thus it has been held, that in the absence of proof of an unequivocal, complete and final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not after his death, upon her uncorroborated statement that he expressly authorized her to carry on upon her own account the business of a farm which she had rented before marriage, and to treat the proceeds as her separate property, admit her claim as against his estate to the proceeds of the farm, which were invested by him during his lifetime (*h*).

Consequences
of separate
trading.

Assuming that the wife is engaged in carrying on a trade separate from her husband, it becomes necessary to consider some of the consequences of her doing so.

Power to
contract and
to sue.

A married woman being a separate trader has, for the purposes of her business, all the powers of contracting and of suing which are conferred by the Act in respect of separate property generally; consequently, she may prove in bankruptcy without joining her husband, and may, of course, also bind her trade assets by any contract which she makes.

This power of suing and being sued is not limited by any qualification. A married woman may sue and be sued in all respects as if she were a *feme sole*. In *Perks v. Mylrea* (*i*), Field, J., said:—

“A *feme sole* can sue to judgment. She may obtain judgment and may have judgment signed against her. Again, damages or costs may be recovered against a married woman. Recovery is the technical word for a common law judgment. I think, therefore, that judgment in

(*g*) *Edwards, In re* (1895), 43 W. R. 509; *Helsby, In re* (1894), 69 L. T. 864, C. A. *Dearmer, In re* (1886), 53 L. T. 905.

(*i*) In Chambers, W. N. (1884)

(*h*) *Re Whittaker, supra*; see also p. 64.

default or under Order XIV. may be signed against a married woman; Chap. XI. s. 5. but I think that execution should only issue against her separate estate."

Another result of the Married Women's Property Acts is that a married woman must now bring her action, in respect of torts, within the statutory period. The Statute of Limitations (*k*) provides that if any person entitled to bring certain actions shall be, at the time of the cause of action accruing, a *feme covert*, such person shall be at liberty to bring such action within the time limited after being discoverd. Subsequently to 1882, the commencement of the Act (January 1st, 1883) has been determined to be the commencement of discoverture, for the purpose of calculating the period of limitation (*l*).

Statute of
Limitations.

It is not absolutely clear whether, by virtue of sect. 1, sub-sect. 2 of the Act of 1882 alone, a married woman can sue her husband in contract. She is, indeed, empowered to sue in all respects as a *feme sole*, but the express declaration that her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or legal proceeding brought by or taken against her, seems to suggest that this sub-section was intended to apply only to those cases in which a married woman took proceedings against persons other than her husband, and to which proceedings her husband would formerly have been a necessary party; and that it was not intended to give to her the right to sue her husband in cases coming within this sub-section alone.

Power to sue
her husband.

But there is no doubt that, in all cases where proceedings are necessary for the protection and security of her separate property, whether she be in trade or no, a married woman can sue her husband; for sect. 12 of the Act of 1882 enacts that—

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress, by way of criminal proceedings, for the protection and security of her own separate property as if such property belonged to her as a *feme sole*; but except as aforesaid no husband or wife shall be entitled to sue the other for a tort."

(*k*) 21 Jac. 1, c. 16, s. 7.

(*l*) *Weldon v. Neal* (1884), 22 W. R. 828.

Chap. XI. s. 5. The effect of these two sections may be summed up thus :

Civil proceedings by a married woman. (1) that a married woman, whenever married, may take civil proceedings in her own name, as if she were a *feme sole*, against all persons, including her husband, where the proceedings are for the protection and security of her separate property ; (2) that a married woman, whenever married, may take proceedings either in contract or in tort or otherwise in her own name, as if she were a *feme sole*, against all persons other than her husband ; and (3) it may be that a married woman, whenever married, may sue her husband in contract, even where the proceedings are not for the protection and security of her separate property, if such a case can exist.

Criminal proceedings by a married woman. With regard to criminal proceedings, a married woman, whenever married, may take such proceedings in her own name for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, against all persons, including her husband ; but this right against her husband is subject to two restrictions : first, while they are living together she cannot take criminal proceedings against him in respect of her property ; and, secondly, while they are living apart she cannot take such proceedings as to any act done by the husband while they were living together, unless the property has been wrongfully taken by him when leaving or deserting, or about to leave or desert her (*m*).

Bill or note. Formerly, when a bill of exchange or promissory note was given to a married woman, her husband alone could indorse or

Bond. sue upon it (*n*) ; and, in like manner, if a bond were given to husband and wife, the husband alone might have sued on it as on a bond made to himself (*o*) ; but now, in such matters, a position of independence has been conferred upon a married woman, which entitles her to maintain an action in her own name.

Right to sue in her own name.

A married woman being empowered by the Act of 1870 to take proceedings for “the protection and security” of her separate property, was entitled to maintain an action against her

(*m*) 45 & 46 Vict. c. 75, s. 12.

(*o*) *Ankerstein v. Clarke* (1792), 4

(*n*) *Mason v. Morgan* (1834), 2 Term Rep. 616.

A. & E. 30.

bankers for dishonouring cheques drawn by her in respect of her separate trade, or for not duly presenting or not giving due notice of dishonour of a bill of exchange acquired by her in such trade, and intrusted to them by her for presentment (*p*); and *à fortiori* under the Act of 1882 she is entitled to the same remedies. It would seem that she can also obtain, if the special circumstances justify the interference of the Court, an injunction restraining her husband from intermeddling with her separate property (*q*).

The trade which the Acts contemplate being carried on "separately from her husband," may be so carried on in partnership with any other person or persons, without imposing on the husband the liabilities of a partner (*r*); and even with her husband she may form a *quasi* partnership (*s*); but it is presumed that in order to establish such a relation the evidence should be very clear. But a married woman, trading as a firm, separately from her husband, cannot be made bankrupt for non-compliance with a bankruptcy notice founded on a judgment obtained against her in the name of the firm (*t*).

The husband was formerly liable for the debts of the concern, if it appeared that he participated with his wife in its benefits. Thus, in *Petty v. Anderson* (*u*), the husband and wife were living together, and the business was carried on in the house, though the wife's name appeared alone in the purchase of goods, in the bills of parcels, in the parish rates, and in a contract with the parish officers; yet, inasmuch as the husband partook of the profits, and was cognizant of, and assented to, the dealings, he was held liable for goods delivered at the house for the purposes of this trade (*x*). It would seem, however, that now, unless actual partnership be established, the mere fact of

Separate trading may be in partnership.

The husband's liabilities where he participated.

(*p*) *Summers v. The City Bank* (1874), L. R., 9 C. P. 580.

(*q*) *Green v. Green* (1840), 5 Hare, 400, n.; *Wood v. Wood* (1871), 19 W. R. 1049; *Symonds v. Hallett* (1883), 24 Ch. D. 346.

(*r*) Formerly a married woman could not be a partner. See Lindley on Partnership, 6th ed. bk. i.

ch. 4, s. 2, p. 86.

(*s*) *Re Childs* (1870), L. R., 9 Ch. 508.

(*t*) *Frances Hundford & Co., In re*, (1899) 1 Q. B. 566, C. A.

(*u*) (1825), 3 Bing. 170.

(*x*) See *Barlow v. Bishop* (1801), 1 East, 432; and *Cotes v. Davies* (1808), 1 Camp. 485.

Chap. XI. s. 5. co-habitation, or that the profits of the wife's trading are enjoyed by the husband, will not necessarily make the trading joint or render him liable for the debts of the business (*y*).

Nothing in the Married Women's Property Acts seems to throw any light upon the questions, whether the wife can, against the wishes of the husband, carry on a separate trade, or whether the husband can by any legal process restrain her from so doing. In a modern case, however, where a woman engaged in business subsequently married, an order was made under sect. 17 of the Married Women's Property Act, 1882, restraining the husband from interfering with his wife's trade (*z*).

Separate trading according to the custom of London.

With regard to the "custom of London," by which a married woman was enabled to trade as a *feme sole*, the following passages are extracted from Roper's Law of Husband and Wife (*a*). The custom, as translated from the Liber Albus in the town-clerk's office, is as follows:—

Extract from the Liber Albus.

"Where a feme covert of the husband useth any craft in the said city on her sole account whereof the husband meddleth nothing, such a woman shall be charged as a feme sole concerning everything that toucheth the craft, and if the husband and wife be impleaded, in such case the wife shall plead as a feme sole; and if she be condemned, she shall be committed to prison till she have made satisfaction, and the husband and his goods shall not in such case be charged nor impeached."

Upon this custom, Mr. Roper says:—

"The trade must be carried on within the city, and on the wife's *sole* account; it seems, therefore, that if by any means it can be proved that her husband had any concern in it, the case will not be protected by the custom (*b*).

Husband's intermeddling excluded.

"The husband's intermeddling is expressly provided against by the custom. He may, however, determine his wife's trading in future, but he cannot do so in retrospect; neither can he do any act to injure her creditors, who are entitled to be satisfied out of her property in trade; but after those demands are satisfied, he may, as it would seem, by law, possess himself of the surplus of her property; for the custom does not extend to this point, it regarding only trade and commerce" (*c*).

- (*y*) *Worsley, In re*, (1901) 1 Q. B. 309. (2nd ed. 1826).
 (*b*) *Langham v. Bewett* (1629), Cro. Car. 68.
 (*z*) *Gaynor v. Gaynor*, (1901) 1 Ir. R. 217.
 (*a*) 2 Rop. Hus. & Wife, 124. (*c*) *Lavie v. Phillips* (1765), 3 Burr. 1776.

The wife, according to this custom, was held liable to a commission of bankruptcy (*d*). Chap. XI. s. 5.

A married woman, although possessed of separate estate, if not carrying on a trade separately from her husband, is not subject to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under sect. 4 of the Bankruptcy Act, 1883 (*e*). Nor does the fact that the debt was ante-nuptial, or that the conduct of the debtor suggested fraud, operate so as to avoid this rule of law (*f*). Wife might be made a bankrupt.
Bankruptcy of a married woman not a trader.

Formerly, a married woman trading could not be made bankrupt, even though she had separate estate (*g*), unless she traded by custom as a *feme sole* within the City of London (*h*); unless her husband was a convict, and so civilly dead (*i*); or, perhaps, unless she had been constituted a *feme sole* by statute, as when living apart from her husband, under a decree of judicial separation or a protection order (*j*).

It is now, however, provided, by sect. 1, sub-sect. 5, of the Married Women's Property Act, 1882, that every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole* (*k*); and the inference, on the principle *expressio unius exclusio alterius*, would seem to be, that in no other case, except that of a separate trader, can a married woman become a bankrupt. Bankruptcy of traders.

Consequently, in order for the liability to accrue, a combination of the two following conditions is absolutely essential:—

- (a) She must be carrying on trade separately from her husband, and

(*d*) *Lavie v. Phillips* (1765), *ubi supra*; *Exp. Carrington* (1739), 1 Atk. 206. See *Beurd v. Webb* (1800), 2 Bos. & Pul. 93, where Lord Eldon, then Lord Chief Justice of the Common Pleas, comments on the cases.

(*e*) *Gardiner, In re* (1887), 20 Q. B. D. 249.

(*f*) *A Debtor, In re*, (1898) 2 Q. B. 576, C. A.

(*g*) *Exp. Jones* (1871), L. R., 12 Ch. D. 484; *Exp. Holland* (1870), L. R., 9 Ch. 307.

(*h*) 2 Roper, Husband and Wife, 124; *Lavie v. Phillips* (1765), 3 Burr. 1776.

(*i*) *Exp. Franks* (1831), 7 Bing. 762.

(*j*) 20 & 21 Vict. c. 85, ss. 21, 26; 41 & 42 Vict. c. 19.

(*k*) Sect. 1, sub-sect. 5.

Chap. XI. s. 5.

- (b) She must be possessed of separate property. Nor is it enough to satisfy the first of these requisite conditions that her pecuniary interest in a business carried on by her husband and herself conjointly is her separate property (*l*).

Extent of
liability of
married
woman
trading
separately.

Where, however, a married woman is, in fact, trading separately, her liability is apparently not confined exclusively to the debts contracted by her in the course of her business or in connection therewith, but extends to "all debts incurred by her in the period during which she was carrying on the trade" (*m*).

Nor is this liability limited to the period during which she actually holds herself out as a trader, it having been decided (*n*) that a married woman who has sold a business, carried on by her separately, must be deemed to be still "carrying on" the business within the meaning of sect. 1, sub-sect. 5, of the Married Women's Property Act, 1882, so long as the debts she has incurred in the business remain unpaid. A receiving order cannot, however, be made against a married woman trading (separately from her husband) under an assumed name upon the ground of non-compliance with a bankruptcy notice founded upon a judgment obtained against her in the firm name under which she has been trading (*o*).

Limitation to
separate
estate.

It should be noticed, moreover, that the liability of a married woman, trading separately from her husband, is a liability limited to her separate estate, and is payable only thereout.

Consequently, the judgment against a married woman is not a judgment against her personally, nor is a bankruptcy notice under sect. 4, sub-sect. 1 (*g*), of the Bankruptcy Act, 1883, applicable; because (as already stated) she is not personally bound to pay the judgment debt at all, the obligation being limited to and payable only out of her separate property (*p*).

(*l*) *Helsby, In re* (1893), 1 Manson, 12.

(*m*) *Dagnall, In re*, (1896) 2 Q. B. 407, Wright, J., at p. 411.

(*n*) *Worsley, In re*, (1901) 1 Q. B. 309.

(*o*) *Frances Handford & Co., In re*, (1899) 1 Q. B. 566, C. A.

(*p*) *Hannah Lynes, In re*, (1893) 2 Q. B. 113, C. A. See also *Elliot, In re*, (1900) 2 Ir. R. 439.

As a necessary sequence of the impersonal character of the Chap. XI. s. 5. only judgment obtainable against a married woman, an attachment of her person is impossible. And this rule applies in all cases, whether the obligation in respect of which the judgment has been obtained is in contract, or results from a devastavit committed by her as an administratrix or executrix; the only exception, and the only case in which an order for attachment can issue against her person, being where a married woman administratrix (or executrix) is shown to be actually in possession of moneys belonging to the (testate or) intestate estate, and fails to comply with an order to pay them into Court (q).

SECTION VI.

MARRIED WOMAN AS TRUSTEE.

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The effect of the Act upon the position of a married woman who is a trustee may now be briefly considered.

Under the former law it was inexpedient to select as a trustee a married woman, or any woman likely to marry; not that the disability of coverture prevented a woman from executing the trusts and powers, but because the appointment was attended by several practical inconveniences. In the first place, the husband, being liable for the breaches of trust committed by his wife, was naturally anxious to superintend her administration, and thus became in fact the trustee instead of his wife (r). Secondly, where land was the subject of the trust, deeds appointing new trustees or conveying the land to the *cestui que trust* required to

(q) *Turnbull, In re*, (1900) 1 Ch. 180.

(r) See, on this point, *Bahin v. Hughes* (1886), 31 Ch. D. 390, C. A.

Married woman a trustee.
Under the old law.

Chap. XI. s. 6. be acknowledged by the married woman ; as, without complying with the statutory formalities, she had no power of passing the legal estate (s). Thirdly, if the trust involved the exercise of a power of sale, there was much difficulty in obtaining the proper receipt for the purchase money. "If it be paid to the husband, it passes into the hands of a stranger ; and if it be paid to the wife, the law immediately transfers it to the husband, who is a stranger" (t).

Power to convey the legal estate under 37 & 38 Vict. c. 78.

The power of conveying the legal estate in certain cases was indeed conferred upon married women by the Vendor and Purchaser Act, 1874 (u), which, by the 6th section, now repealed and replaced by sect. 16 of the Trustee Act, 1893 (x), enacts that when any freehold or copyhold hereditaments shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*. This enactment, however, does not extend to leaseholds, and, moreover, considerable uncertainty prevails as to the precise meaning of the words "bare trustee."

Meaning of term "bare trustee."

"The term is generally considered to be ambiguous ; but it will probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, and has been requested by them so to convey it" (y).

Vice-Chancellor Hall, in a case (z) which involved the construction of the same words in another section of the Act, approved of this statement, leaving out, however, the words "and has been requested by them so to convey it," which he regarded as introducing an "ingredient" neither important nor necessary to a person being a bare trustee ; whereas in a subsequent

(s) See *Cahill v. Cahill* (1883), 8 A. C. 420. *In re*, (1902) 1 Ch. 451.

(t) Lewin on Trusts, 11th ed. See also *Docwra, In re* (1885), 29 Ch. D. 693 ; and *Att.-Gen. v. Beech*, (1899) App. Cas. 53, at p. 60.

(u) 37 & 38 Vict. c. 78.

(x) 56 & 57 Vict. c. 53. And (z) *Christie v. Ovington* (1875), see *Howgate & Osborn's Contract*, 1 Ch. D. 279.

case (a), Jessel, M. R., said that if those words were left out, he was "utterly at a loss to make out any meaning of it at all." That eminent judge, while expressly abstaining from giving a judicial opinion, indicated that he differed from the authorities already cited, and regarded a "bare trustee" as a trustee without any beneficial interest. The correctness of this definition has, however, since been doubted (b).

Chap. XI. s. 6.

Unless a married woman was a "bare trustee," whatever meaning may be ultimately given to that expression, she could only convey freeholds with the concurrence of her husband, and by deed acknowledged; and the Married Women's Property Acts do not apparently vary her position in this respect (c). It has, however, been decided that a married woman, to whom, subsequently to 1882, real estate is conveyed by way of mortgage to secure money belonging to her as separate property, can convey to a purchaser from the mortgagor without the concurrence of her husband, or acknowledgment of the deed of conveyance by her under the Fines and Recoveries Act (d).

We have seen that there were three practical drawbacks to the appointment of a married woman as a trustee. Of these, the first is clearly removed by the Act, which, by the 24th section, declares that the word "contract" in the Act shall include the acceptance of any trust, or of the office of executrix or administratrix; and that the provisions of the Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee, or executrix, or administratrix, either before or

Effect of the
Act of 1882.

(a) *Morgan v. Swansea Sanitary Authority* (1878), 9 Ch. D. 582.

(b) *Cunningham, In re*, (1891) 2 Ch. 567, at pp. 571, 572.

(c) A bill introduced by the Lord Chancellor is now before Parliament (May, 1905), and will probably shortly become law, providing that—

"A married woman who either alone or jointly with any other person or persons is an executrix or administratrix of the estate of

any deceased person, or a trustee of property subject to any trust, shall be, and as from the 1st day of January, 1883, shall be deemed to have been, capable of disposing, or of joining in the disposition of any property, whether real or personal, forming part of the estate of such deceased person, or subject to any such trust, without her husband, as if she were a *feme sole*."

(d) *Brooke & Fremlin's Contract, In re*, (1898) 1 Ch. 647.

Chap. XI. s. 6. after her marriage; and that her husband shall not be subject to such liabilities, unless he has acted or intermeddled in the trust or administration. The third objection to the appointment of a married woman to be a trustee disappeared with the marital right during the coverture; and there remains, therefore, only the question as to the legal estate, which will probably be dealt with by the legislature in the near future (e). Notwithstanding the enormous change which has taken place in the legal status of a married woman during the last five-and-twenty years, the consensus of judicial opinion, even at the present day, seems to show that although there is neither an inherent, nor a legal objection to the appointment of a *feme covert* as trustee, on the whole it is advisable that such appointment should not be made (f), not, of course, upon the ground of either legal or mental unsuitability, but because marital interests or influence may tend unduly to sway a married woman's judgment in the exercise of her duties as a trustee.

Inadvisability
of appointing
married
woman as
trustee.

In the case of unmarried women (though there is always the possibility that they may reconsider their positions and enter into the bonds of Hymen) the same objections do not apply (g).

SECTION VII.

LIABILITIES OF MARRIED WOMEN.

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Liabilities
imposed on
married
women.

The privilege of holding separate property has been conferred on a married woman, but the grant has been accompanied by

(e) See note (c), on p. 399.

(g) *Dickenson's Trusts, In re*,

(f) *Turnbull, In re*, (1900) 1 Ch. W. N. (1902) 104.

the imposition of statutory liabilities. At common law a married woman could not be sued either in contract or in tort, the plea of coverture being a complete answer to the action. Her legal liability, therefore, at the present day, depends entirely upon statute; and the consequences of that liability will be found, as in the case of a man, to be measured by the extent of her property. Chap. XI. s. 7.

We shall now proceed to give an outline of the successive enactments by which a married woman has been rendered liable to an action.

Under the Divorce and Matrimonial Causes Act, 1857 (*h*), a married woman who had obtained a decree of judicial separation or a protection order was placed in the position of a *feme sole* for the purposes of contracts and wrongs and injuries, and of suing and being sued in any civil proceeding; and her husband was not liable in respect of any engagement or contract she might have entered into, or for any wrongful act or omission by her, or for any costs she might incur as plaintiff or defendant. But it was not until the Act of 1870 was passed, which, as has been already stated (*i*), recognized, to a limited extent, the existence of separate property, that liabilities were imposed on married women generally. By that Act a wife, married on or after the 9th August, 1870, was rendered liable to be sued for her ante-nuptial debts as if she had continued unmarried (*k*). The husband was released from all liability, and the separate property of the wife became the only fund available for such creditors. Any married woman having separate property was, by the same Act, liable to maintain her husband (*l*) and children (*m*) if they became chargeable to any union or parish. The Divorce and Matrimonial Causes Act, 1857.

The Married Women's Property Act, 1870.

Ante-nuptial debts.

Maintenance of husband and children.

After four years it was discovered that "it was not just that the property which a married woman had at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage" (*n*); and, accordingly, the liability of the husband in respect of such debts The Married Women's Property Act, 1874.

(*h*) 20 & 21 Vict. c. 85.

(*m*) Sect. 14.

(*i*) *Ante*, p. 341.

(*n*) Married Women's Property

(*k*) Sect. 12.

Act, 1874, Preamble.

(*l*) Sect. 13.

Chap. XI. s. 7. was restored to the extent of certain assets received by him in the character of husband (*o*). But the primary liability of the wife's separate estate was not affected by that Act, except that it might have to bear the additional burthen of the husband's costs of defence (*p*). The husband's liability existed only during the marriage; for, as the Act provided that the husband and the wife should be sued jointly, no action would, after the death of the wife, lie against the husband alone, notwithstanding that he had received assets from his wife (*q*).

This Act was not retrospective, and, accordingly, husbands married between the 9th August, 1870, and the 30th July, 1874, continued to enjoy complete immunity in respect of their wives' ante-nuptial debts and contracts (*r*).

The Married
Women's
Property
Acts, 1882
and 1893.

The Married Women's Property Acts, 1882 and 1893, do not enact in so many words that the disability of coverture shall, as to women married on or after the 1st January, 1883, cease and determine; but their whole scope is to place a married woman in the position of an unmarried woman, and their clauses contain a detailed enumeration of her privileges and liabilities. Her privileges have been already discussed; her liabilities under these Acts may be summarized as follows:—

1. She can contract, and sue or be sued in contract or in tort or *otherwise* (sect. 1 (2), Act 1882), whether she be possessed of separate property or not (sect. 1, Act 1893); and in any action or proceeding instituted by her, costs may be ordered to be paid out of her property subject to restraint on anticipation (sect. 2, Act 1893).
2. She may be made a bankrupt if she is a separate trader. (Sect. 1 (5).)
3. She may hold shares in companies and other property to which liability is attached. (Sects. 6, 7.)
4. She is liable, not only for her ante-nuptial debts as before the Act, but also in respect of ante-nuptial contracts and

(*o*) Married Women's Property Act, 1874, s. 5. *Matthews v. Whittle* (1880), 13 Ch. D. 811. (*q*) *Bell v. Stocker* (1882), 10 Q. B. D. 129.
 (*p*) *London and Provincial Bank v. Bogle* (1878), 7 Ch. D. 773. (*r*) *Conlon v. Moore* (1875), Ir. Rep., 9 C. L. 190.

torts, and as a contributory to the assets of a joint stock company. (Sect. 13.) Chap. XI. s. 7.

5. She is liable to the parish for the maintenance of her husband and children as before the Act, and also for the maintenance of her grandchildren. (Sects. 20, 21.)
6. She is liable for breaches of trust and devastavit committed either before or after her marriage. (Sect. 24.)

Nor are these liabilities limited by the amount of her separate property.

Under the Act of 1882 the husband is liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies, to the extent of all property belonging to his wife "which he shall have acquired or become entitled to" through her, after deducting any payments made by him in respect of any such liabilities of hers (*s*); but a right of action is given against the husband alone, as well as against the husband and wife jointly (*t*). The liability of the husband will therefore continue after the marriage is at an end, if he has derived any property from his wife; since, however, he will, as the law now is, only acquire property through her by way of gift, it is not probable that the question will be of much practical importance.

Liability of the husband for the ante-nuptial obligations of the wife.

It appears, therefore, that a husband married before August 9th, 1870, is subject to his common law responsibility in respect of his wife's ante-nuptial liabilities; that a husband married between that date and July 30th, 1874, is not liable at all for his wife's ante-nuptial debts or contracts; that a husband married between July 30th, 1874, and January 1st, 1883, is liable during the marriage for his wife's ante-nuptial debts, torts and contracts to the extent of her property received by him; and that a husband married since December 31st, 1882, is liable for such debts, wrongs and contracts to the extent of property received by him from his wife.

Summary of legislation.

(*s*) Married Women's Property Act, 1882, s. 14. (*t*) *Ibid.* ss. 14, 15.

Chap. XI. s. 7.

Effect of the
repeals of the
earlier Acts
by the Act of
1882.

The Act of 1882 repeals the two earlier Acts; but the repeal is not to affect any act done or right acquired while either of those Acts was in force, nor is it to affect the right or liability of any husband or wife, married before it came into force, to sue or be sued under the provisions of those Acts for or in respect of any debt, contract, wrong or any other matter in respect of which any right or liability shall have accrued to or against such husband or wife before the Act of 1882 came into operation.

CHAPTER XII.

SEPARATION OF HUSBAND AND WIFE BY
PRIVATE ARRANGEMENT.

SECTION I.

CONFLICT OF THE CIVIL AND ECCLESIASTICAL JURISDICTIONS.

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THE putting asunder of those whom God has joined together is prohibited by the policy of the law and the precepts of religion. Hence, all attempts to separate husband and wife were anciently censured as *contra bonos mores*. Separations by private arrangement anciently censured.

Again, the voluntary parting of married persons by their own private arrangement necessarily implied some *contract* between them. This, however, according to the text of Littleton, could not be: for he tells us, "they are but one person in law," and so are incapable of contracting with each other. Hence, all agreements for separation between husband and wife were anciently treated as nullities. Treated as nullities.

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Ecclesiastical sentences of divorce for adultery and for cruelty.

But in cases of adultery, and in cases of cruelty, on the part either of husband or wife, the Church allowed, and by her spiritual Courts awarded, sentences of divorce *à mensâ et thoro*. And the practice of granting such sentences for such offences became a part of our social institutions, and was recognized in our temporal tribunals. So that for adultery, or for cruelty, separations by ecclesiastical authority might take place without any breach of the law, and (as we must suppose) without any offence to religion.

Therefore, when it was said, as in many cases it was affirmed, that the separation of husband and wife was "prohibited by the policy of the law and the precepts of religion," the proposition must be received with those exceptions and qualifications which the decisions of the spiritual Courts annexed to it.

Futile operation of such sentences.

The sentences of divorce *à mensâ et thoro* granted by those Courts did not often, it must be owned, repay the pains bestowed in obtaining them. For, what was their effect? The husband and wife were indeed personally severed from each other; but the tie of matrimony remained still unloosed. They did not cease to be spouses; they were merely discharged from the duty of cohabitation. They might at any time again come together, and by mutual consent put an end to the sentence, which in fact contemplated and invited a reconciliation.

Substitution of private separations, and sanction of the civil Courts.

Under these circumstances, it was a natural reflection, that for sentences so futile, so inconclusive, and so unsatisfactory, separations *en pais* might advantageously be substituted in all cases of adultery or of cruelty, where the parties concerned had sense enough to agree to such private arrangements; which, consequently, were frequently resorted to by the laity, and came gradually to be countenanced by the temporal Courts, upon the principle that all the good purposes of an ecclesiastical sentence might thereby be attained without the cost, exposure and humiliation necessarily incident to a judicial inquiry (*a*).

Extension of

More recently it will be found that the temporal Courts,

(*a*) "Is it desirable," said Lord Cottenham in the House of Lords, "that parties should be compelled to bring such complaint in the

Ecclesiastical Court to public discussion?" See *Wilson v. Wilson* (1846), 1 House of Lords Cases, 538.

proceeding on considerations of utility and convenience, saw Chap. XII. s. 1.
reason for extending their sanction to voluntary separations in private separations to other cases than those of adultery and cruelty.
cases where neither adultery nor cruelty appeared.

But, in the words of one capable authority (b)—

“It may be doubted whether there is any principle of policy which requires that matrimonial disputes (unlike all others) should never be settled by private adjustment, and which renders it better to litigate than to compromise them. In cases where there has been on one side that species of misconduct which, according to law, ought to be followed by a state of separation, the public is not injured if the guilty party acquiesces without a judicial process in that state which the law has declared to be right. In other cases where the conduct has not been such as to form a ground, according to the law of the Ecclesiastical Courts, for a compulsory divorce, it is still a material question whether causes of less moment may not morally justify a separation by consent. And though the circumstances may sometimes be such as not even to afford a moral justification, it is to be remembered that the law does not undertake the task of enforcing every moral duty; and while the parties immediately concerned are satisfied, it is by no means clear that any public interest renders it necessary for courts of justice to interfere, and enter in each case upon an inquiry into moral conduct; an inquiry often so difficult and intricate, that any conclusion which they might arrive at would be as likely to be wrong as to be right. The wide difference between the views of different judges upon these points proves that it is at least questionable whether the toleration at present allowed to voluntary separations ought to be withdrawn.”

The toleration here referred to has certainly not been withdrawn since the time when Mr. Jacob wrote (c). On the contrary, private separations have not only been judicially sanctioned, but have actually been enforced by the temporal tribunals; and this too in cases where there was no charge either of adultery or of cruelty. Private separations now enforced by the civil courts.

When husband and wife are separated by private arrangement, they still continue to be husband and wife as before: for, in the great case of *Marshall v. Rutton* (d), a principle (which had been disturbed by some prior determinations) was, upon much consideration and with great solemnity, affirmed and reiterated by the Court of King's Bench, to this effect, namely: that husband and wife cannot by mutual agreement *change their legal characters and capacities*. After separation parties still husband and wife;

(b) See 2 Rep. 277, n., 2nd ed.
by Jacob (1826).

(c) 1824-26.

(d) (1800), 8 Term Rep. 545.

Chap. XII. s. 1.
but relieved
from cohabi-
tation.

But although this is undoubtedly true on the one hand, it is equally clear on the other, that a deed of separation properly framed will discharge both husband and wife from the performance of one of the cardinal nuptial duties—the duty of cohabitation.

SECTION II.

DEEDS OF SEPARATION.

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An agreement for the separation of husband and wife is usually by formal deed ; but, like other agreements, it may also be by executory articles (e).

Separation
deed : usual
provisions.

Separation deeds usually contain stipulations with reference to (1) the husband and wife living apart ; (2) the property of one or both of the parties ; and (3) the custody of the children. Before, however, examining in detail the contents of these deeds, some explanation is perhaps desirable of the anomaly, that permitted a husband and wife who, under the old law, were generally incapacitated from bargaining between themselves, to enter into a mutual contract. It will be found that this power of contracting depended on the right to compromise a matrimonial action, which had been either actually com-

Capacity of
the wife to
contract.

(e) As in the cases of *Wilson v. Vansittart v. Vansittart* (1858), 4 *Wilson* (1846), 1 H. L. Cas. 538 ; K. & J. 62.

menced, or rendered inevitable by the inharmonious relations of the parties. Chap. XII. s. 2.

Lord Selborne, L. C., in a modern case on the subject (*f*), thus explains the difficulty :—

“To the general incapacity of husband or wife to sue or to be sued by each other, matrimonial suits between them for a divorce *à mensâ et thoro*, for a dissolution or nullity of marriage, or for restitution of conjugal rights, were (of course) necessary exceptions; and some power to terminate such suits by way of compromise would appear, on sound principles, to have been reasonably incident to the power to institute and to defend them. But the reason founded upon the necessity of such a case goes no further than this, that the parties ought to be capable of coming to an agreement with each other concerning the subject-matter of the suit, so as to make its further prosecution (possibly, also, the institution at a future time of other similar proceedings) unnecessary; and that, if they do so, that agreement must be a good consideration for any other stipulations concerning property which either of them, acting within the limits of his or her general legal competency, may, as part of the same arrangement, make in favour of the other. A husband may contract by a deed or articles of separation to pay an annuity, or to convey property, real or personal, for the benefit of his wife; and a wife may contract to release or transfer for the benefit of her husband real or personal estate settled to her separate use, when there is no restraint on anticipation. These are not matters within the scope of the litigation; but as the husband has full power to contract concerning his own property, and as the wife has full power to contract concerning her separate estate with any stranger, so may they, in consideration of an agreement to compromise a matrimonial suit, contract concerning the same matters *inter se*.”—Page 429.

The Lord Chancellor then proceeded to examine the authorities, and deduced from them the three following propositions:—

1. Agreements for separation founded on the compromise of matrimonial suits and differences are not contrary to the policy of the law.
2. The compromise of such suits is a sufficient consideration for such agreements between husband and wife (*g*).
3. The wife, so far, at all events, as may be necessary to enable such compromises to be made, is to be regarded as placed towards her husband in the position of a *feme sole*.

(*f*) *Cahill v. Cahill* (1883), 8 A. C. 420.

(*g*) And see *Weston, In re*, (1900) 2 Ch. 164.

Chap. XII. s. 2.

Limits of
power to
contract.

A married woman, however, cannot in a separation deed contract concerning her real or personal estate in a manner in which she could not contract with a stranger (*h*). Thus, an attempt to bind her separate property, in respect of which she is restrained from anticipation, or her real estate, or reversionary personalty (not separate), without the observance of the statutory requirements, is futile and void (*i*).

Under the Married Women's Property Act, 1882, a married woman's power to contract is considerably enlarged; and, with the sole exception of property which she is restrained from anticipating, she now possesses the same power of contracting by a separation deed as the husband formerly had. This extended operation of the Act is due partly to its enlarging the amount of her separate property, and partly to the power which has been conferred upon her, of entering into contracts as well with her husband as with a stranger.

Circum-
stances under
which separa-
tion deeds
may be
entered into.

Contracts between husband and wife to live apart from each other are not, as they were at one time considered to be, against the policy of the law, and may be specifically performed (*k*); and specific performance of a covenant not to institute proceedings for restitution of conjugal rights has been enforced by injunction against the husband (*l*). According to the modern practice, the covenant would constitute matter of defence in the Probate and Divorce Division (*m*); and such a defence is equally available when the wife is plaintiff (*n*). Where, however, there has been a *material* breach of the conditions contained in the deed of separation, a decree will be granted (*o*). And although *pending* proceedings cannot now be restrained by injunction, the husband or wife may be restrained from *instituting* proceedings

(*h*) *Cahill v. Cahill* (1883), 8 A. C. 420. See the speech of Lord Selborne at p. 431, where he limits the generality of Sir G. Jessel's propositions in *Besant v. Wood* (1879), 12 Ch. D. 605.

(*i*) *Cahill v. Cahill*, *ubi supra*. See also *Vansittart v. Vansittart* (1858), 4 K. & J. 62.

(*k*) *Wilson v. Wilson* (1846), 1 H. L. Cas. 538; *Hart v. Hart*

(1881), 18 Ch. D. 670.

(*l*) *Hunt v. Hunt* (1861), 4 De G., F. & J. 221.

(*m*) *Marshall v. Marshall* (1879), 5 P. D. 19.

(*n*) *Marshall v. Marshall*, *ubi supra*. See also *Clark v. Clark* (1885), 10 P. D. 188.

(*o*) *Tress v. Tress* (1887), 12 P. D. 128. See also *Kunski v. Kunski* (1899), 68 L. J. P. 18.

to compel a return to cohabitation (*p*). If the husband and wife enter into a prospective arrangement for separation at a future time, the deed is void on the ground of public policy, and cannot be enforced (*q*). The distinction thus drawn by the Courts between contracts for an immediate and for a future separation, depends upon the fact, that in the latter case there can be no immediate necessity, and therefore no justification, for entering into such a contract. Chap. XII. s. 2.

It has, however, been held in a modern case that the assignment by a husband of chattels real to trustees to pay the income derivable therefrom to his wife, for life, or so long as she should continue the cohabiting wife, or the widow of the settlor, was not void as against the policy of the law (*r*).

A separation deed is generally made between the husband, of the first part, the wife, of the second part, and trustees, of the third part. Trustees were, before the Married Women's Property Act, 1882, essential to the validity of such a deed, for a husband and wife could not covenant with each other; and the objection to these deeds, which at one time prevailed on the ground of public policy, seems to have been overcome by the consideration of the trustees' obligations. "It has always," said Lord Eldon (*s*), "seemed to me very difficult to hold these deeds legal. It seems to be admitted, that a mere agreement to live separate is one that would not be deemed valid; and it seems strange, as Sir William Grant observes, that if the primary object be vicious, these auxiliary provisions should be held good, and thereby that which the law objects to should be carried into effect" (*t*). Form of deed.

(*p*) *Besant v. Wood* (1879), 12 Ch. D. 605. And see *Cercle Restaurant v. Lavery* (1881), 18 Ch. D. 555.

(*q*) *Westmeath v. Westmeath* (1830), 1 Dow & Cl. 519; *Egerton v. Lord Brownlow* (1853), 4 H. L. Cas. 1. And see *post*, p. 418.

(*r*) *Hope-Johnstone, In re*, (1904) 1 Ch. 470.

(*s*) *Westmeath v. Westmeath* (1830), Jac. 126, 142.

(*t*) See also *Guth v. Guth* (1792), 3 Bro. Ch. C. 614; *Legard v. Johnson* (1797), 3 Ves. 352. The dictum of Sir W. Grant referred to above seems to be contained in *Worrall v. Jacob* (1817), 3 Mer. at p. 268, where he says, "The object of the covenants between the husband and the trustees is to give efficacy to the agreement between the husband and the wife."

Chap. XII. s. 2. Under the Married Women's Property Act, 1882, it seems that a husband and wife can carry out the arrangement for separation without the intervention of trustees: for they can now enter into mutual covenants, and can convey property to each other (*u*).

Where property is to be held in trust, trustees will, of course, be added; and, in that event, the covenants of the parties will be entered into not only *inter se*, but with the trustees. It may also be mentioned that, as the authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority, it is terminated by a separation deed (*x*), and the covenant of indemnity usually entered into by the trustees does not involve them in any serious liability.

According to a common form the deed contains a recital that (*y*)—

“Unhappy differences have arisen between the said A. B. (*the husband*) and C. B. (*the wife*) by reason whereof they have agreed to live separate and to enter into the arrangement intended to be effected by these presents.”

“Unhappy differences.”

In *Clough v. Lambert* (*z*), where the words of the recital were merely that “divers unhappy differences subsisted between the husband and wife, in consequence of which they had agreed to live separate,” Sir Lancelot Shadwell held enough was said; because “there might have been circumstances alluded to by the recital which would have warranted a divorce *à mensâ et thoro*.” It is now, however, quite clear that the grounds, which would warrant a decree for dissolution of marriage or for a judicial separation, are not indispensable to support a deed of separation (*a*).

(*u*) The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 50.

(*x*) *Eustland v. Burchell* (1878), 3 Q. B. D. 432. In respect of credit, the effect of a valid deed of separation is, apparently, to exclude the liability of the husband as effectually as though a judicial

separation had been decreed between the parties; as to which latter, see *Wingfield and Blew, In re*, (1904) 2 Ch. 665, C. A.

(*y*) See Davidson's Concise Precedents in Conveyancing, 17th ed. p. 676; Key & Elphinstone's Precedents, 8th ed. p. 440 *et seq.*

(*z*) 10 Sim. 174.

(*a*) See *Sanky v. Golding* (1579),

Next follow necessary particulars, as to the children of the marriage, and of the wife's separate real and personal estate, succeeded by a recital of the agreement made by the wife's trustees to join and enter into the covenants and obligations hereafter contained in the indenture (*b*).

The deed, continuing, next contains a covenant by the husband with his wife and with her trustees that henceforward she may live separate from him as if she were unmarried (*c*). In some forms this is followed by a proviso that "he will not sue or prosecute any person for receiving or assisting her."

Covenant by husband.

It is apprehended, however, that this proviso is merely one of the many examples of surplusage to be found in legal documents. For though, in cases where there is no separation by mutual consent, the husband is entitled to recover damages for deprivation of *consortium* from any person who wrongfully harbours his wife, or entices her away from him (*d*); where the separation is by deed, such deed is in itself evidence of actual consent by the husband to his wife living separate and apart from him, and consequently would effectually bar his right of action against any third party who might receive her. Provided, of course, there is no suggestion that the wife is living in adultery with the person who harbours her (*e*).

Carey, 124; *Seeling v. Crawley* (1700), 2 Vern. 386; *Head v. Head* (1747), 3 Atk. 547; *Fletcher v. Fletcher* (1788), 2 Cox, 99.

(*b*) In the case of marriages solemnized since the passing of the Married Women's Property Act, 1882, the intervention of trustees is not absolutely necessary (*Sweet v. Sweet*, (1895) 1 Q. B. 12). Having regard, however, to the fact that the initial cause of a separation between husband and wife is almost invariably owing to disputes having arisen between them, the interposition of dispassionate third parties is obviously very desirable.

(*c*) A deed of separation is a good answer to a writ of *habeas corpus* sued out by a husband to re-possess

himself of his wife: *Rex v. Mead* (1758), 1 Burr. 542; *Rex v. Winton* (1792), 5 Term R. 89.

(*d*) *Smith v. Kaye* (1904), 20 T. L. R. 261.

(*e*) *Evans v. Evans*, (1899) P. 195. In former times it was considered that a husband possessed a general power over his wife's personal liberty, and a learned judgment was pronounced by Coleridge, J., in *Re Cochrane* (1840), 8 Dowl. P. C. 630, from which it may be collected that a wife, who without cause absented herself from her husband, might then have been recovered by force or stratagem. The decision in *The Queen v. Jackson*, (1891) 1 Q. B. 671, C. A., that where a wife refuses to live with

Chap. XII. s. 2.

Reciprocal
covenants by
husband and
wife.

Next follow reciprocal covenants by both husband and wife, that neither shall molest the other (*f*), or endeavour by any legal proceedings for the restitution of conjugal rights or otherwise to enforce a resumption of cohabitation (*g*).

Since the Judicature Act, no injunction can be granted restraining a pending action (*h*); but the institution of proceedings may be restrained (*i*). If, however, a wife, who has agreed by a separation deed not to sue her husband for restitution of conjugal rights, institutes a suit in violation of her covenant, the deed may be successfully pleaded by way of defence, although it does not furnish a ground for staying proceedings on an interlocutory application (*k*).

Several agree-
ment not to
sue for
divorce.

A further agreement between the parties that each shall not sue the other for divorce or judicial separation, upon the ground of any past matrimonial offence, is also sometimes here inserted (*l*). Where this is done, although not amounting to condonation in the case of subsequent misconduct by the other party, it effectually bars any proceeding in respect of an antecedent offence (*m*).

Maintenance
of wife.

When the wife has no adequate separate property, there is next usually inserted a covenant by the husband with the trustees (either with or without a *dum casta* clause (*n*)) to pay to them a stated yearly sum for the wife's maintenance.

her husband he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights, has, however, entirely reversed this old proposition.

(*f*) As to what does and what does not constitute "molestation" within the meaning of this covenant, see *Hunt v. Hunt*, (1897) 2 Q. B. 547, C. A. It was held by Brett, M. B., in *Fearon v. Aylesford* (1884), 14 Q. B. D. 792, C. A., that in order to constitute a breach of a covenant in a separation deed against molestation by a wife, some act must be done by her, or by her authority, with intent to annoy her husband, and which is in fact an annoyance to him. See also *Besant*

v. Wood (1879), 12 Ch. D. 605.

(*g*) A deed of separation ousts the jurisdiction of magistrates under the Summary Jurisdiction (Married Women) Act, 1895: *Piper v. Piper*, (1902) P. 198.

(*h*) 36 & 37 Vict. c. 66, s. 24 (5).

(*i*) *Besant v. Wood* (1879), 12 Ch. D. 605.

(*k*) *Marshall v. Marshall* (1879), 5 P. D. 19.

(*l*) As to the advantage of insertion, see *Moore v. Moore* (1887), 12 P. D. 193.

(*m*) *Clark v. Clark* (1885), 10 P. D. 188, C. A.; *Aldridge v. Aldridge* (1888), 13 P. D. 210.

(*n*) Although the insertion of a *dum casta* clause has been held

Formerly, an annuity was not apportionable, unless it was Chap. XII. s. 2. expressed to be for the maintenance of the annuitant (*o*), an exception supported by the necessity of the case, and the consequent presumption of the intention (*p*); but under the Apportionment Act, 1870 (*q*), annuities are, like interest on money lent, to be considered as accruing from day to day, and are apportionable in respect of time accordingly.

In consideration of this provision it is usual for the trustees here to covenant to indemnify the husband against all debts of the wife that may be contracted by her while separate. Husband's indemnity.

Although where a husband and wife separate by mutual consent, and the wife makes her own terms as to her income, her authority to pledge her husband's credit is at an end, even when her income proves insufficient for her support (*r*).

When the wife is possessed of large separate means, a provision for paying, to her husband, an annuity thereout is sometimes made. Annuity to husband.

"unusual" (*Hart v. Hart* (1881), 18 Ch. D. 670), its insertion is desirable, as in its absence a deed of separation and annuity is not terminable by reason only of the subsequent adultery of the wife: *Wasteney v. Wasteney*, (1900) A. C. 446; *Sweet v. Sweet*, (1895) 1 Q. B. 12. On the other hand, the agreement to live apart is not a licence to the husband to commit adultery (*Dowling v. Dowling*, (1898) P. 228), although while the arrangement continues the commission of a matrimonial offence by the husband will not entitle the wife to more than was stipulated for in the deed. But when she has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Such circumstances justify her in bringing a suit for dissolution of marriage, and she is

entitled to all the incidents of that suit, and, amongst them, to an allowance based on her husband's actual income: per Sir J. Hannen in *Morrall v. Morrall* (1881), 6 P. D. 100. But a wife entitled to an allowance under a separation deed cannot claim alimony *pendente lite*: *Powell v. Powell* (1874), L. R., 3 P. & M. 186. See also *Williams v. Baily* (1866), L. R., 2 Eq. 731.

(*o*) *Howell v. Hanforth* (1775), 2 W. Bl. 1016; *Hay v. Palmer* (1728), 2 P. Wms. 501; *Anderson v. Dwyer* (1804), 1 Sch. & Lef. 301; *Sheppard v. Wilson* (1845), 4 Hare, 395; *Leathley v. Trench* (1858), 8 Ir. Ch. Rep. 401.

(*p*) See note to *Exp. Smyth* (1818), 1 Swanst. 349.

(*q*) 33 & 34 Vict. c. 35. And see, as to the former law, 4 & 5 Will. 4, c. 22.

(*r*) *Eastland v. Burchell* (1878), 3 Q. B. D. 432.

Chap. XII. s. 2.**Subsidiary covenants.**

Covenants as to the devolution of the wife's separate property, and probate of her will, in the event of her predeceasing her husband (u), together with provisions as to the custody, access to, and maintenance of the children of the marriage (x), and for further assurance, are also usually inserted.

Provision that on renewal of cohabitation the deed shall be void.

The last clause usually found in a deed of separation, is one which provides that its provisions shall wholly cease in the event of the husband and wife resuming cohabitation (y). The terms of this clause are as follows :—

"Provided always, &c., that in case the said A. B. and C. B. shall be reconciled to each other and cohabit together, or if their marriage shall be dissolved by any court of competent jurisdiction in respect of anything done or suffered by either party after the execution of these presents, then and in either of the said cases the covenants, agreements and provisions herein contained shall forthwith be void, except in respect of any sale or disposition or other act previously made or done, and of proceedings for a breach of the said covenants and provisions previously committed."

According to some forms, this clause is omitted on the ground that a renewal of cohabitation will of itself vacate the deed (y), but it seems expedient to insert it, since otherwise it becomes a question of intention, to be gathered from all the provisions of the deed, whether it is to have any operation in the event of a reconciliation. Thus, where the deed contained provisions beyond the purview of a mere separation deed, it was held that it could be supported after a return to cohabitation as a valid settlement (z). A clause providing for the renewal of cohabitation in a separation deed, executed on the occasion of "unhappy differences" between a man and his deceased wife's

(u) As to the rights of the husband upon the death of his wife intestate, see *ante*, p. 150.

(x) Sect. 21 of the Married Women's Property Act, 1882, makes a married woman, having separate property, liable for the maintenance of her children and grandchildren.

(y) *Nicol v. Nicol* (1886), 31 Ch.

D. 524, C. A.; *Durant v. Titley* (1819), 7 Price, 577; *Fletcher v. Fletcher* (1788), 2 Cox, 99; *Hindley v. Marquis of Westmeath* (1827), 6 Barn. & Cress. 200; *Marquis of Westmeath v. Marchioness of Westmeath* (1830), 1 Dow & Clark, 519; *Jee v. Thurlow* (1824), 2 Barn. & Cress. 547.

(z) *Ruffles v. Alston* (1875), L. R., 19 Eq. 539.

sister, will be rejected, since the parties can never legally live together as husband and wife (*a*). Chap. XII. s. 2.

What shall constitute a renewal of cohabitation, so as to come within the terms and meaning of this clause, may be a question. Casual meetings in society, it is presumed, will not have this effect (*b*); and it is doubtful whether forgiveness, or even the interchange of expressions of conjugal affection and tenderness, by letter, or otherwise, will put an end to the deed; because the physical separation may still continue, and be kept up advisedly (*c*). What will constitute a renewal of cohabitation.

It has been held, in a recent case, that acts of sexual intercourse between the parties subsequently to the execution of a separation deed, do not necessarily and in all circumstances avoid the instrument (*d*).

The terms of this clause are such as to require both reconciliation and a renewal of cohabitation in order to avoid the deed; but if there be subsequent cohabitation, the Court will, in the absence of special circumstances, presume that a reconciliation has taken place. "Living, however, under the same roof"—adopting the language of Lord Eldon (*e*)—"in a state of the highest animosity," will not amount to a reconciliation, or avoid the separation deed under this clause; and, on the other hand, a correspondence by letter showing that "no hostility remained" will not indicate a waiver or abandonment of the contract (*f*).

Nor will a resumption of cohabitation amount to accord and

(*a*) *Exp. Naden* (1874), L. R., 9 Ch. 670.

(*b*) See *Wilson v. Mushett* (1832), 3 Barn. & Adol. 743; and *Slatter v. Slatter* (1834), 1 You. & Coll. Ex. 28; *Randle v. Gould* (1857), 6 W. R. 108.

(*c*) It is related of a late eminent conveyancer that he used to introduce into deeds of separation a clause, which he called the "five minutes' clause," whereby he pro-

vided, that if the husband and wife should at any time be together for five minutes, after either of them had requested the other to depart, the deed should instantly become void!

(*d*) *Rowell v. Rowell*, (1900) 1 Q. B. 9, C. A.

(*e*) *Bateman v. Ross* (1813), 1 Dow, 235, 245.

(*f*) *Frampton v. Frampton* (1841), 4 Beav. 287.

Chap. XII. s. 2. satisfaction, of a cause of action which has already accrued to the wife in respect of arrears of maintenance (g).

SECTION III.

MISCELLANEOUS POINTS AS TO DEEDS OF SEPARATION.

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Prospective arrangements for separation.

In Lord Hardwicke's time, it would rather appear that *prospective* arrangements for the separation of husband and wife were not deemed necessarily void. That great judge himself did not expressly condemn them (h). And in *Rodney v. Chambers* (i), Mr. Justice Le Blanc said, there was no satisfactory reason why an agreement to separate *de futuro* should be bad, if an agreement *de presenti* for the same purpose should be good. However, the distinction has been taken, and is still maintained on grounds of policy (k). Accordingly, in *Westmeath v. Westmeath* (l), the House of Lords expressed a clear opinion, that a deed providing for a future separation could not be supported. The same conclusion seems derivable from *Vandergucht v. De Blaquiére* (m), before Lord Chancellor Cottonham, although the precise point was not raised in that case.

- (g) *Macan v. Macan* (1901), 70 P. C. 268.
 L. J. Q. B. 90. (i) (1802), 2 East, 283, at p. 297.
 (h) *Moore v. Moore* (1737), 1 Atk. 277; West, 35, 43. See also *Lord Vane's case* (1744), 13 East, 171, n.; (k) See, however, *Hope-Johnstone, In re*, (1904) 1 Ch. 470.
 and *Hoare v. Hoare* (1790), 2 Ridg. (l) (1830), 1 Dow & Clark, 519.
 (m) (1839), 5 Myl. & Cr. 229.

Since the decision in *Vandergucht v. De Blaquiere* numerous cases (n) have come before the Courts of Equity on this point, and it may now be considered as clearly decided that a deed *tending* to the future separation of husband and wife is void on grounds of public policy (o), though a deed providing a fund for the wife's support on the occasion of an immediate separation will be held valid (p).

In *Rodney v. Chambers* (q), the Court of King's Bench held that the husband's covenant to allow his wife a separate maintenance, in case a separation should take place with the *approbation of the trustees*, was a legal and valid covenant. The principle of this decision was explained by Mr. Justice Lawrence in the following terms:—

Domestic forum to decide when separation should take place.

"We thought that there was nothing illegal in the parties agreeing to refer the question as to what was a good cause of separation to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. We, therefore, only decided that a covenant for separation with the consent of the trustees was good. Not that a covenant was good *generally* that a wife might separate from her husband whenever she pleased; for that would be to make the husband tenant at will to the wife of his marital rights."

There seems to be nothing to prevent the insertion of a clause declaring that the trusts and covenants for payment shall continue, notwithstanding the renewal of cohabitation. Thus, in *Wilson v. Mushett* (r), Mr. Justice Littledale said:—

Proviso that the trusts shall continue though cohabitation be renewed.

"The proviso that the trusts shall continue, though the parties live together again, only means that the husband intends to secure to the wife,

(n) *Egerton v. Lord Brownlow* (1853), 4 H. L. Cases, 1; *Cartwright v. Cartwright* (1853), 3 De G., M. & G. 932; *H. v. W.* (1857), 3 Kay & J. 382; *Merryweather v. Jones* (1864), 4 Giff. 509; *Procter v. Robinson* (1866), 14 W. R. 381.

(o) *Moore, In re* (1888), 39 Ch. D. 116, C. A. But see *Hope-Johnstone, In re*, (1904) 1 Ch. 470.

(p) *Jee v. Thurlow* (1824), 2 B. & C. 547; *Jones v. Waite* (1839), 4 Man. & Gr. 1104; 5 Bing. N. C.

341. *Semble*, a covenant before marriage that in case of any separation taking place between the husband and wife, the husband shall make a certain provision for his wife, is void: *Cocksedge v. Cocksedge* (1844), 14 Sim. 244. See also 5 Hare, 397.

(q) (1802), 2 East, 283.

(r) (1832), 3 Barn. & Adol. 743. See *Exp. Naden* (1874), L. R., 9 Ch. 670.

Chap. XII. s. 3. for her separate use, the property settled by the deed, as he might have done originally on their marriage."

A deed of separation may make a permanent settlement of the husband's property, giving the wife a future interest, and containing provisions for the benefit of children (s).

Separation
a good con-
sideration for
a promise to
pay.

In *Jones v. Waite* (t), it was held that a promise to pay money upon condition that the promisee would execute a deed of separation, was a promise not void for illegality of consideration. A deed of separation had been drawn up, but not executed by the husband. To induce him to execute the deed, a third party undertook to pay his debts. It was held by the House of Lords, that the consequent execution of the instrument by the husband formed a good consideration for the agreement, and entitled him to enforce it (u).

Deed pre-
sumed valid.

A deed of separation is *prima facie* valid. The Court does not presume illegality (x).

What will
constitute
valuable con-
sideration.

The question whether a separation deed is voluntary, or for valuable consideration, depends chiefly on the provisions which it contains with respect to property and debts; for although, as has been already stated (y), the compromise of a matrimonial action, or threatened action, is a sufficient consideration to support an agreement to live separate, as between husband and wife, it has never been decided that such a compromise imported a valuable consideration into a separation deed, as against creditors and purchasers (z).

A covenant by the trustees to indemnify the husband against the debts of the wife, although such a covenant involves a mere *scintilla* of liability, is considered to be a valuable consideration (a), even when the covenant is conditional and executory (b);

(s) *Sparks' Trusts, In re*, (1904) 1 Ch. 451; *S. C.*, (1904) 2 Ch. 121; *Worrall v. Jacob* (1817), 3 Mer. 256.

(t) (1839), 4 Man. & Gr. 1104.

(u) (1842), 9 Cl. & Fin. 101. See also *Clough v. Lambert* (1839), 10 Sim. 174.

(x) *Jones v. Waite* (1842), 9 Cl. & Fin. 101.

(y) *Ante*, p. 408.

(z) As to what constitutes valuable consideration for this purpose, see *Weston, In re*, (1900) 2 Ch. 164.

(a) *Stephens v. Olive* (1786), 2 Bro. C. C. 90; *Worrall v. Jacob* (1817), 3 Mer. 256; *Gibbs v. Harding* (1870), L. R., 5 Ch. 336.

(b) *Wellesley v. Wellesley* (1839), 10 Sim. 256.

but the covenant is not an essential part of a separation deed (c). Chap. XII. s. 3.

But a deed which does not contain such an indemnity, and is not founded on valuable considerations, though binding on the parties, has been held void against creditors and purchasers (d).

Where no valuable consideration void against creditors and purchasers. How far deed good against creditors and purchasers.

When, however, such a deed is supported by valuable consideration, it will, like other post-nuptial settlements, be good against creditors and purchasers. The Court will "not weigh the consideration in too nice scales" (e). Thus in the case of *Eastland v. Burchell*, it was held that a wife, making her own terms as to her income, had, subsequently to separation from her husband, no implied authority to pledge his credit (f). And the relinquishment by the wife of her claim to alimony in the Ecclesiastical Court (g) would appear to be a valuable consideration, though this point has not been actually decided (h).

A Court of Equity will enforce executory articles of separation, when such articles affect property (i).

Executory articles of separation. Where deed destroyed.

In *Seagrave v. Seagrave* (k), a husband executed a bond to a trustee for the wife, for payment to her of a weekly allowance, she being separated from him. The bond was destroyed by the trustee, with the husband's privity. The wife sought relief in equity. Sir W. Grant said:—

"What is the extent of the relief necessary? The plaintiff has obtained a discovery—an admission that the bond is destroyed. According to modern doctrine, therefore, an action upon the bond will lie without proof. All, therefore, that the plaintiff seems to require is, that she may be at liberty to bring that action in the name of her trustee; and that is all therefore that I shall decree."

The wife's subsequent adultery (k), resulting in the birth of

Wife's adultery.

(c) *Frampton v. Frampton* (1841), 4 Beav. 287.

8 T. R. 521; *Frampton v. Frampton* (1841), 4 Beav. 287.

(d) *Fitzer v. Fitzer* (1742), 2 Atk. 511; *Clough v. Lambert* (1839), 10 Sim. 174; *Cowx v. Foster* (1860), 1 J. & H. 30.

(h) *Jodrell v. Jodrell* (1815), 9 Beav. 45; and *Wilson v. Wilson* (1846-8), 1 H. L. Cas. 538.

(e) Per Lord Hardwicke, in *Fitzer v. Fitzer* (1742), *supra*.

(i) *Wellesley v. Wellesley* (1839), 10 Sim. 256; *Wilson v. Wilson* (1846-8), 14 Sim. 405; 1 H. L. Cas. 538; *Gibbs v. Harding* (1870), L. R., 5 Ch. 336.

(f) (1878), 3 Q. B. D. 432.

(g) *Hobbs v. Hull* (1788), 1 Cox, 445. See *Nunn v. Wilmore* (1800),

(k) (1807), 13 Ves. 439, at p. 444.

Chap. XII. s. 3. a child (*l*), or even the dissolution of the marriage in consequence of her misconduct (*m*), is no bar to her remedies under a deed of separation. But the Court has, under the Divorce and Matrimonial Causes Acts, power to deal with separation deeds as settlements (*n*).

If the wife makes, on the occasion of the separation, a fraudulent representation to her husband with reference to her past conduct, whereby he is induced to execute the deed, it cannot be relied upon as a condonation; and *semble*, it is incapable of being enforced by the guilty wife (*o*).

Her claim
under the
Statute of
Distributions.

The provision for the wife, by deed of separation, does not necessarily affect her right to a share of the husband's personal estate under the Statute of Distributions (*p*); nor apparently any other legal right to which she may be entitled on the death of her husband.

When there are children of the marriage, it is usual to provide in separation deeds for their custody, maintenance and education, a subject which is treated incidentally in the next chapter.

(*l*) *Sweet v. Sweet*, (1895) 1 Q. B. 12.

(*m*) *Charlesworth v. Holt* (1873), L. R., 9 Ex. 38.

(*n*) 22 & 23 Vict. c. 61, s. 5; 41 & 42 Vict. c. 19, s. 3. *Worsley v. Worsley* (1869), L. R., 1 P. & M. 648; *Benyon v. Benyon* (1876), 1 P. D. 447. In *Charlesworth v. Holt*, *ubi supra*, it was doubted whether the earlier Act applied to deeds made before it was passed; while in *Ansdell v. Ansdell* (1880),

5 P. D. 138, a retrospective operation was given to the Act of 1878, the decree absolute not having been made till after the Act. See also *Yglesias v. Yglesias* (1879), 4 P. D. 71.

(*o*) *Brown v. Brown* (1868), L. R., 7 Eq. 185.

(*p*) *Slatter v. Slatter* (1834), 1 You. & Coll. Ex. 28; and see *Simpson, In re*, (1904) 1 Ch. 1, C. A.

CHAPTER XIII.

THE CUSTODY, EDUCATION AND MAINTENANCE
OF CHILDREN.

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A TREATISE on the law of husband and wife can scarcely be regarded as complete, without a chapter on the rights and liabilities of the parents with respect to the children of the

Rights and
liabilities of
parents.

Chap. XIII. marriage. The consideration of these rights and liabilities will conveniently fall under the following heads :—

- I. During cohabitation.
- II. After separation.
- III. After the death of the husband.

I. The rights and liabilities during cohabitation.

Courts having jurisdiction.

Before the passing of the Judicature Act, 1873 (*a*), the Court of Chancery had exclusive jurisdiction in the matter of infants. By that statute all the Divisions of the High Court possess a concurrent jurisdiction (*b*), in the exercise of which the rules of equity are to prevail (*c*). Particular subjects are, however, assigned to the several Divisions, and among others the wardship of infants and the care of infants' estates are assigned to the Chancery Division (*d*).

Education of children.

It is not usual to provide by ante-nuptial settlements for the custody, education, or maintenance of the children of the marriage, there being fortunately, in the majority of cases, complete unanimity on the part of the husband and wife in respect of these important matters. When, however, dissensions arise or the parents belong to different religions, the children not unfrequently become the occasion of quarrel, and acrimonious litigation. While the husband and wife continue to live together, no question can arise as to the custody or maintenance of the children; but their education, and especially their religious education, may excite dissension between the parents, and result in their separation, or in an appeal to the Courts for a legal adjustment of their differences.

Right of husband to control their education.

By the common law of England, the wife, in all that relates to the education of children, is completely subordinated to her husband. His authority is in all cases paramount, and it is contrary to the policy of the law, that he should bind himself to relinquish any part of that authority (*e*). Thus, it is com-

(*a*) 36 & 37 Vict. c. 66.

D. 75.

(*b*) 36 & 37 Vict. c. 66, s. 34; and
R. S. C. 1883, Ord. LV. r. 25.

(*d*) 36 & 37 Vict. c. 66, s. 25 (10).

(*c*) *Re Goldsworthy* (1876), 2 Q. B.

(*e*) *Vansittart v. Vansittart* (1858),
2 De G. & J. 249.

pletely established that an ante-nuptial promise by the father, Chap. XIII.
that the children of the marriage shall be brought up in a religion different from his own, is not binding (f). Not bound by ante-nuptial promise.

The law will not allow him to fetter his judgment as to what will be best for the interests of his children; and, therefore, the most solemn agreement that they shall be brought up in the religion of the wife may immediately after the marriage be repudiated by the husband, even though she consented to the marriage solely on the faith of that agreement. "As between the husband and the wife, the question is to be determined as if there had never been any such promise, and just as if she or her husband had embraced a new faith after the marriage" (g).

It was at one time held that no amount of acquiescence will bind a father to allow his children to be brought up in accordance with such a promise; for although they may have imbibed distinctive religious impressions which it may be injurious to change, yet the father "as king and ruler in his own family" has a right to decide that question for himself (h). But in a modern case (i), where there was distinct evidence of a Roman Catholic father having, in this matter, abdicated his parental authority and acquiesced in his wife bringing up the children in the Protestant faith, an attempt on his part, upon the death of his wife, to resume control of their religious training was restrained by the Court upon the ground that a change of doctrine would be prejudicial to the children. After the death Nor by acquiescence.

(f) Per Malins, V.-C., in *Re Agar-Ellis* (1878), 10 Ch. D. 49. In this case it was stated by James, L. J., that "on principle and authority the ante-nuptial promise is, in point of law, absolutely void." This is scarcely consistent with the opinion of Mellish, L. J., expressed in *Andrews v. Salt* (1873), L. R., 8 Ch. 622, at p. 637, that in considering whether the father had waived or abandoned his rights, such a promise "is a circumstance to which weight, and, perhaps, great weight,

ought to be attached."

(g) Per Sir W. M. James, L. J., in *Re Agar-Ellis* (1878), 10 Ch. D. 49, 71. See also on the subject of ante-nuptial promises, *Re Browne* (1852), 2 Ir. Ch. Rep. 151; *Hill v. Hill* (1862), 10 W. R. 400; *Re Meades' Minors* (1862), Ir. L. Rep., 5 Eq. 98; *Andrews v. Salt* (1873), L. R., 8 Ch. 622.

(h) See *Re Agar-Ellis* (1878), 10 Ch. D. 75.

(i) *Newton, In re*, (1896) 1 Ch. 740, C. A.

Chap. XIII. of a father the question of acquiescence by him in the matter of religious training becomes very important (*k*).

But the Court will interfere in the interests of the children.

In the interests of the children, however, the Court has frequently interfered to protect them from abuse of the parental power.

"The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt the law may take away from him this right, or may interfere with his exercise of it, just as it may take away his life, or his property, or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But in the absence of some conduct by the father entailing such forfeiture, or amounting to such abdication, the Court has never yet interfered with the father's legal right" (*l*).

Although the forfeiture or abdication referred to by Lord Justice James in this passage is not very closely connected with the relations of husband and wife, it may be convenient, in this place, to enumerate the leading authorities for the several propositions which are implied in the above statement.

In cases of—
i. Moral turpitude.

The father may be deprived of the custody of his children if his conduct is so immoral that it would contaminate the children (*m*), or if he has been guilty of ill-treatment and cruelty towards them (*n*). Where the father was a person of intemperate and vicious life, and in the habit of using gross and disgusting language as well as personal violence to his wife, the Court declined to grant him a writ of *habeas corpus* to remove the child (a boy of nine years) from unobjectionable custody (*o*).

(*k*) *Post*, p. 443.

(*l*) Per Sir W. M. James, L. J., in *Re Agar-Ellis* (1878), 10 Ch. D. 72. See also the Custody of Children Act, 1891.

(*m*) *Wellesley v. Duke of Beaufort* (1827), 2 Russ. 1; *Swift v. Swift* (1865), 34 Beav. 266; 4 De G., J. & S. 710; *Goldsworthy, In re* (1876), 2 Q. B. D. 75; and see sect. 7 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27). The

onus of showing he is a reformed character is on the father, under sect. 7 of this Act: *Webley v. Webley* (1891), 64 L. T. 839.

(*n*) *Webley v. Webley* (1891), 64 L. T. 839; *Handford v. Handford* (1890), 63 L. T. 256; *Whitfield v. Hales* (1806), 12 Ves. 492; *Rex v. Greenhill* (1836), 4 Ad. & E. 624.

(*o*) *Re Goldsworthy* (1876), 2 Q. B. D. 75; see *Re Fynn* (1848), 2 De G. & Sm. 457.

The common law right of the father to the custody of his children is now, moreover, considerably circumscribed by statute, it being provided by section 5 of the Guardianship of Infants Act, 1886 (*p*), that—

Chap. XIII.
Guardianship
of Infants
Act, 1886.

“The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge such order on the application of either parent, or after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just” (*q*).

Speculative opinions, of whatever kind they may be, do not, however, in the eye of the law, disqualify a father from having the custody of his child; but it seems that if the opinions are grossly immoral or irreligious, and are not only held but inculcated, the Court will not, considering the material interests of the infant, allow it to be brought up in a manner likely to work utter ruin to the child (*r*). But the mere fact of the conviction of the father for theft will not necessarily disentitle him to the custody of his children (*s*).

It is now provided by the Prevention of Cruelty to Children Act, 1904 (*t*), that where a parent or other guardian of any child or children under the age of sixteen years is found by a Court of competent jurisdiction to have been guilty of certain statutory offences, defined by section 2 of the Act, against such child or children, he or she shall be liable to fine or imprisonment, or to both.

Prevention of
Cruelty to
Children
Act, 1904.

It is also enacted (section 1) in cases of cruelty to children (which term includes any form of ill-treatment likely to cause such child or children unnecessary suffering or injury to health)

(*p*) 49 & 50 Vict. c. 27.

(*q*) And see *Grant v. Reid* (1901), 3 F. 330, Ct. of Sess.; *A. and B., In re*, (1897) 1 Ch. 786, C. A.

(*r*) See *Shelley v. Westbrook* (1821), Jac. 266; *Thomas v. Roberts*

(1850), 3 De G. & Sm. 758, and the remarks of Jessel, M. R., in *Re Besant* (1879), 11 Ch. D. 513.

(*s*) *A. C. v. B. C.* (1902), 5 F. 108, Ct. of Sess.

(*t*) 4 Edw. 7, c. 15.

Chap. XIII. that the parent or guardian so offending shall be guilty of a misdemeanour, and shall be liable, upon summary conviction, to a maximum fine of 25*l.*, either with or without imprisonment, or upon conviction on indictment to a fine not exceeding 100*l.*, either with or without imprisonment for a maximum term of two years.

It is also provided by section 6 of this Act, that—

“Where a person having the custody, charge, or care of a child under the age of sixteen years has been convicted of committing in respect of such child an offence of cruelty”

within the meaning of the Act, or any of the offences mentioned in the First Schedule appended thereto, or has been bound over to keep the peace towards such child, such person shall, if the Court so adjudge, henceforward be deprived of the custody of such child.

ii. Abandonment.

The legal right of a father to the custody of his children may, under certain circumstances, be abandoned by him. That is to say, he may, by acquiescing for a long time in their being brought up by persons of superior wealth and social position, preclude himself from reclaiming the children. Thus, where the father had no means of educating the children in a manner suitable to their fortune, where they had been for ten years out of his custody, and had moved in a society higher than that which he enjoyed, the Court declined to order the children to be delivered up to him (*u*).

iii. Desertion.

Closely connected with the subject of abandonment is that of desertion, which now constitutes a statutory ground for depriving a parent of the custody of his or her children. Section 3 of the Custody of Children Act, 1891 (*x*), providing,—

“Where a parent has (a) abandoned or deserted his child; or (b) allowed his child to be brought up by another person at that person’s expense, or by the guardians of a poor law union, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that,

(*u*) *Lyons v. Blenkin* (1821), Jac. 245. See also *Powel v. Cleaver* (1789), 2 Bro. C. C. 499; *Creuze v. Hunter* (1790), 2 Cox, 242.

(*x*) 54 Vict. c. 3.

having regard to the welfare of the child, he is a fit person to have the custody of the child" (y). Chap. XIII.

The fourth case (z) in which the Court will actively interfere against a father's right to the control of his children, is when he seeks to remove them, being wards of Court, out of the jurisdiction. In such a case the Court has to act upon suspicion, and there is considerable difficulty in interposing effectively; but it seems that the Court may either grant an injunction to restrain the father from removing the child, requiring him at the same time to give security; or else it may remove the child from the custody of the father (a). iv. Removal of ward out of jurisdiction.

If a child is out of the custody of its father, his remedy for its recovery is either to obtain a writ of *habeas corpus*, or to constitute the child a ward of Court, which is usually done by settling a small sum of consols for the benefit of the infant and then bringing an action for its administration (b); but the existence of property is not a condition precedent to the exercise of the jurisdiction (c). In proceedings under writs of *habeas corpus* the question always is whether the person is in illegal custody without his consent; and the Court, when a child is brought up on such a writ and is of age to consent—that is to say, fourteen in the case of boys, and sixteen in the case of girls—will always inquire whether it does or does not consent to remain in its present custody. If the child consents to remain where it is, the ground of the application falls away, and no order can be made on the return of the writ (d). Custody: remedies of the father.

(y) As to what constitutes desertion for the purposes of this section, see *O'Hara, In re*, (1900) 2 Ir. R. 232, C. A.

(z) See *Re Agar-Ellis* (1883), 24 Ch. D. 317.

(a) *De Manneville v. De Manneville* (1804), 10 Ves. 52; *Re Plombley* (1882), 47 L. T. 283; *Agar-Ellis, In re* (1883), 24 Ch. D. 317, C. A.; *Favard v. Favard* (1897), 75 L. T. 664.

(b) See as to constituting an infant a ward of Court, *Seton on Decrees*, p. 996 *et seq.*; *De Peredu*

v. De Mancha (1881), 19 Ch. D. 451; but see *Brown v. Collins* (1883), 25 Ch. D. 56.

(c) *Re Fynn* (1848), 2 De G. & Sm. 457; *Re Spence* (1847), 2 Ph. 247; *Brown v. Collins* (1883), 25 Ch. D. 56. See, however, the observations of Cotton, L. J., in *Re Agar-Ellis* (1883), 24 Ch. D. 332; and see, after father's death, *McGrath, In re*, (1892) 2 Ch. 496; and *Guardianship of Infants Act*, 1886.

(d) *Re Agar-Ellis* (1883), 24 Ch. D. 317; see p. 326. When the

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The jurisdiction of equity in relation to guardianship is not fettered by the considerations which apply to writs of *habeas corpus*; and, though in particular cases there may be practical difficulties in handing over to a father the custody of a reluctant child, yet the law of England, according to Sir W. B. Brett, M. R. (*e*), is that "the father has the control over the person, education and conduct of his children until they are twenty-one years of age" (*f*).

Maintenance :
liability of
parents, how
enforced.

Both parents are now, by law, equally liable for the maintenance of their children (*g*); but this natural and moral obligation can only be indirectly enforced either by the action of the parish authorities or by criminal proceedings (*h*); and no means exist, where the child has been voluntarily supported by a stranger, of recovering from its parents the cost of its maintenance. If the child becomes chargeable to the union, the guardians can recover from the parents the cost of maintaining it in the work-house. And if the neglect of the parents to supply the child with the necessaries of life is sufficiently aggravated, the parents become liable to prosecution. Thus by the Poor Law Amendment Act, 1868 (*i*), it is enacted that when any parent shall wilfully neglect to provide adequate food, clothing, medical aid or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be liable on

31 & 32 Vict.
c. 122.

infant has not attained years of discretion, its wishes will not be consulted: *Reg. v. Clarke* (1857), 7 E. & B. 186.

(*e*) *In re Agar-Ellis* (1883), 24 Ch. D. at p. 326.

(*f*) As to procedure when a person, "in contempt," removes a child out of the jurisdiction of the Court, see *Gordon v. Gordon and Gordon*, (1904) P. 163, C. A.

(*g*) The father's liability depends upon the statute 43 Eliz. c. 2, and that of the mother upon the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). s. 21.

(*h*) "It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation." Per Cockburn, C. J., in *Bazeley v. Forder* (1868), L. R., 3 Q. B. 559, 565. See also *Cooper v. Martin* (1803), 4 East, 76; *Urmston v. Newcomen* (1836), 4 Ad. & E. 899; *Mortimore v. Wright* (1840), 6 Mees. & W. 482.

(*i*) 31 & 32 Vict. c. 122, s. 37.

summary conviction to six months' imprisonment, with or without hard labour. The punishment of the parent, however, does not supply a very efficacious protection to the child (*k*). Chap. XIII.

Where, however, as in a separation deed, the maintenance of the children of the marriage becomes one of the elements of the contract between the parties, the parent (usually the father) entering into a covenant to pay a specific sum is not relieved from liability under the covenant by the mere fact that circumstances have arisen rendering the maintenance of the child or children less onerous than it had hitherto been (*l*). Covenant for maintenance in separation deed.

When infants are entitled to property, the Court will not apply any part of such property for their maintenance if the father is living and competent to maintain them (*m*). His competence, however, is measured by the social position and expectations of the children, and an allowance has been made to assist a father who had an annual income of 6,000*l.* (*n*). In another case (*o*) a testator left property to the value of 10,000*l.* a year to be accumulated for twenty-one years, and directed the accumulations to be laid out in the purchase of land to be held in trust for Sir H. Havelock (who was about fifty years of age at the date of the will) for life, and afterwards for his eldest son for life and his first and other sons in tail; and in default of issue of the eldest son, in trust for the second son and his issue in similar terms, with divers limitations over. As Sir H. Havelock possessed only a moderate income, Vice-Chancellor Malins directed a sum of 2,700*l.* per annum to be allowed to him for the benefit of the infants. And in yet another case the Court sanctioned a scheme for allowing 4,000*l.* per annum (in lieu of 500*l.* as directed by the testator) out of an income of 14,000*l.* per annum for the up-keep of the family mansion and maintenance there of the infant tenant in tail (*p*). Maintenance sometimes allowed to father out of infant's property.

(*k*) See also 4 Edw. 7, c. 15, ss. 1 and 6.

(*l*) *Rowell v. Rowell* (1903), 89 L. T. 288, C. A.

(*m*) *Jackson v. Jackson* (1737), 1 Atk. 513.

(*n*) *Jervoise v. Silk* (1813), 1 G. Coop. 52.

(*o*) *Havelock v. Havelock* (1881), 17 Ch. D. 807.

(*p*) *Walker, In re*, (1901) 1 Ch. 879. See also *Greaves' Settled Estates, In re*, (1900) 2 Ch. 683.

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A father is entitled, whether of independent means or not, to the income of a fund when there is an absolute trust to apply the *whole* income, and not merely such part as the trustees shall think fit, towards the maintenance of the children (*q*). And where there is a trust for maintenance in a marriage settlement, and the father has maintained the children without calling for contribution from the fund, he has been held to be, on the ground of contract, in the position of a purchaser of so much of the fund as it would have been proper to apply in maintenance (*r*).

Discretionary
power in
trustees.

Where a discretionary power as to maintenance is vested in trustees, the Court will not interfere with their discretion if it be fairly and honestly exercised (*s*). In several cases, however, the Court has controlled an improper or unsound, as opposed to a dishonest, exercise of such a discretion (*t*). On the other hand, an "absolute discretion and uncontrollable authority," or an "uncontrolled and irresponsible discretion" will not, in the absence of *mala fides*, be reviewed by the Court, even where it is of opinion that the trustees are not acting judiciously (*u*).

Ability of
mother.

The ability of the mother to maintain her children was not formerly regarded by the Court in questions relating to maintenance, either during the lifetime of the father (*x*), or after his death (*y*); but it may be doubtful whether, under sect. 21 of the Married Women's Property Act, 1882, which renders her liable to maintain her children, her ability to do so will not be taken into account in the same manner as that of the father.

(*q*) *Berkeley v. Swinburne* (1834), 6 Sim. 613; *Stocken v. Stocken* (1838), 4 My. & Cr. 95; *Meacher v. Young* (1834), 2 My. & K. 490. *Secus*, where there is only a power: *Thompson v. Griffin* (1840), Cr. & Ph. 317.

(*r*) *Mundy v. Earl Howe* (1793), 4 Bro. C. C. 223, a case which has been criticised, disapproved, and followed; see *Ransome v. Burgess* (1806), L. R., 3 Eq. 773; *Re Ker-ri-son's Trusts* (1871), L. R., 12 Eq. 422; *Wilson v. Turner* (1883), 22 Ch. D. 521.

(*s*) *Costabadie v. Costabadie* (1847), 6 Hare, 410.

(*t*) *In re Hodges* (1878), 7 Ch. D. 754; *In re Roper's Trusts* (1879), 11 Ch. D. 272.

(*u*) *Gisborne v. Gisborne* (1877), 2 A. C. 300; *Tabor v. Brooks* (1878), 10 Ch. D. 273. See also *Tempest v. Lord Cumoye* (1882), 21 Ch. D. 571; *In re Weaver* (1882), *ibid.* 615.

(*x*) *Hailey v. Bannister* (1819), 4 Mad. 275.

(*y*) *Douglas v. Andrews* (1849), 12 Beav. 310.

Trustees have now full power to apply the income of property held by them for an infant on any contingency for his or her benefit; for, by the 43rd section of the Conveyancing and Law of Property Act, 1881 (z), which applies only, if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, it is enacted as follows:—

“Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.”

In the case of *Page, In re (a)*, it was held by the Court that a trustee who, without suspicion of fraud, had expended the *corpus*, as well as the income, of the estate of a *cestui que trust* upon his education and up-bringing, was entitled to plead the Statute of Limitations, and sect. 8 of the Trustee Act, 1888 (b), as a defence in an action brought by the *cestui que trust* against him, twelve years after the plaintiff had attained his majority.

Applications to the Court as to the guardianship and maintenance or advancement of infants are now made by summons at chambers (c).

II. *The rights and liabilities after separation.*

A separation deed, when there are any infant children who are to be handed over to their mother's custody, should fix the age at which such custody shall cease; and, if necessary, should make provision for the maintenance of the children. The terms, also, on which the father shall have access to them, the schools to which they shall be sent, and the manner in which the vacations shall be spent, ought to be expressly defined.

Separation deeds: provisions as to custody of children.

(z) 44 & 45 Vict. c. 41.

and 8 of this Act are *not* repealed by the Trustee Act, 1893).

(a) (1893) 1 Ch. 304.

(c) R. S. C. 1883, Ord. LV. r. 2

(b) 51 & 52 Vict. c. 59 (sects. 1 (12).

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When formerly void.

It was formerly considered that a provision in a separation deed, whereby the children were to be placed entirely in the custody of the mother, was void on the ground of public policy; for an agreement whereby a father bound himself not to act upon his own judgment for the benefit of his children without the consent of his wife, was held to be repugnant to his parental duty (*d*).

Specific performance.

And, accordingly, specific performance of an agreement, which contained such a stipulation, was on this ground refused, although if the deed had been executed, the insertion of such a provision would not have made it wholly void (*e*). But an agreement, entered into on the occasion of a separation, whereby the husband bound himself to secure an annuity for the maintenance of his wife and child, has been specifically enforced by the Court (*f*). An agreement under which the husband delegated to trustees the disposal of the children during their school vacations has also been enforced (*g*).

36 Vict. c. 12.

By an Act to amend the law as to the custody of infants (*h*), it is enacted that no agreement contained in any separation deed, made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother (*i*); and it is also thereby provided that no Court shall enforce any such agreement, if it shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.

This enactment, which was passed in consequence of the decisions in *Hope v. Hope* and *Vansittart v. Vansittart*, now enables the Court specifically to perform an agreement for

(*d*) *Vansittart v. Vansittart* (1858), 4 K. & J. 62; 2 De G. & J. 249. See also *Hope v. Hope* (1857), 8 De G., M. & G. 731; *Walrond v. Walrond* (1858), John. 18.

(*e*) *Vansittart v. Vansittart* (1858), 4 K. & J. 62; 2 De G. & J. 249.

(*f*) *Gibbs v. Harding* (1870), L. R., 5 Ch. 336.

(*g*) *Hamilton v. Hector* (1871),

L. R., 6 Ch. 701.

(*h*) 36 Vict. c. 12, s. 2; short title, *Infants' Custody Act*, 1873.

(*i*) It has been held that the words "custody and control" in sect. 2 of this Act comprise all the rights which a father has over his children, including that of directing their religious education. *Condon v. Follum* (1887), 57 L. T. 154.

separation, one term of which is that the wife shall have the custody of the children (*k*). Chap. XIII.

It seems that a provision that the husband shall pay an annuity to the wife "for herself and child or children, she to maintain the child or children," will be construed as an agreement that she shall have the custody of the children (*l*). On the other hand, an agreement that the deed shall contain "all usual terms as to access to children, &c." is limited to access, and a clause giving the mother the custody of the children will be struck out (*m*).

The cases in which a separation has taken place without any provision having been made for the custody of the children have now to be considered. Where no clause as to custody of children.

In a modern case, Sir G. Jessel, M. R., said: "Before the passing of the Act commonly known as Serjeant Talfourd's Act (*n*), there is no doubt that you could not take away the custody of a child from its father, except you showed that either he was unfit to remain the custodian of the child, or that his so remaining would be an injury to the child" (*o*).

That Act, however, conferred upon the Court of Chancery a discretionary power as to the custody of an infant under the age of seven years who was in the sole custody or control of its father. By the Act to Amend the Law as to the Custody of Infants (*p*) Serjeant Talfourd's Act was repealed, and was re-enacted in wider terms as follows:— 36 Vict. c. 12.

"Sect. 1. From and after the passing of this Act (*q*) it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants, at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her con-

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| <p>(<i>k</i>) <i>Hart v. Hart</i> (1881), 18 Ch. D. 670.</p> <p>(<i>l</i>) <i>Hart v. Hart</i>, <i>supra</i>.</p> <p>(<i>m</i>) <i>Evershed v. Evershed</i> (1882), 30 W. R. 732. Both these cases may be consulted as to the power of the Court to settle the deed, not-</p> | <p>withstanding an arbitration clause.</p> <p>(<i>n</i>) 2 & 3 Vict. c. 54; repealed by 36 & 37 Vict. c. 12.</p> <p>(<i>o</i>) <i>Re Taylor</i> (1876), 4 Ch. D. 157, 159.</p> <p>(<i>p</i>) 36 Vict. c. 12.</p> <p>(<i>q</i>) 24th April, 1873.</p> |
|---|--|

Chap. XIII. trol, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct; and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said Court shall deem proper."

Policy of the Acts.

The object with which these Acts were passed was that a wife might not be precluded from seeking justice from her husband by the terror of that power, which the law gave to him, of taking her children from her: that she might, in fact, be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother (*r*).

Principles on which the Court acts.

In administering the Act, the Court is bound to have regard, first, to the paternal right; secondly, to the marital duty; and, thirdly, to the interest of the children (*s*). That is to say, it will recognize the exclusive rights of the father as they existed at common law, and interfere with them only so far as may be necessary to give effect to the objects of the Act. The fulfilment of the marital duty is the condition on which the paternal right is recognized, and, lastly, assuming that the father has been guilty of misconduct, the Court has to inquire, in the interest of the child, whether it will be better cared for, in the custody of the father, or in that of the mother (*t*).

There is, of course, no jurisdiction to make an order under the Act when the infant is over sixteen years of age (*u*). But, under the former Act, where some of the children were over, and some under, the age of seven years, the Court ordered the former, as well as the latter, to be delivered to the mother, in order to avoid "the great evil and danger to the children of separating one portion of the family from the other" (*x*). If the children are in the actual custody of the father, it

(*r*) See *Warde v. Warde* (1849), 2 Q. B. D. 614. Phil. 786.

(*s*) *Re Halliday's Estate* (1853), 17 Jur. 56; *Re Taylor* (1876), 4 Oh. D. 157; *Re Elderton* (1884), 32 W. R. 227.

(*t*) *Ethel Brown, In re* (1884), 13

(*u*) *Re Agar-Ellis* (1883), 24 Ch. D. 317, 330.

(*x*) *Warde v. Warde* (1849), 2 Phil. 786; see, however, *Symington v. Symington* (1875), L. R., 2 H. L. Sc. 415.

seems to require a stronger case to justify the Court in interfering than if they are in the custody of the mother, or of a stranger (*y*). Chap. XIII.

The order, when made, generally provides that the child shall be in the custody of its mother until further order, and also that the father shall be allowed free access to the child at all reasonable times (*z*).

If the wife leaves her husband without sufficient cause (*a*), or has no adequate income (*b*), or has been proved to have misconducted herself (*c*), the Court will, as a rule, decline to deliver the children to her.

By the Divorce and Matrimonial Causes Act, 1857 (*d*), it is enacted that "in any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of such suit or other proceeding; and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery;" and by the amending Act (*e*), this power has been extended, so as to enable the Court to make orders upon petition after the final decree has been pronounced.

Further provisions as to the custody of children are made by sect. 5 of the Summary Jurisdiction (Married Women) Act, 1895, which enacts, by sect. 5 (*b*), that where a married woman

Power of Court under 20 & 21 Vict. c. 85, and 22 & 23 Vict. c. 61.

58 & 59 Vict. c. 39.

(*y*) *Re Elderton* (1884), 32 W. R. 227.

(*z*) *Re Taylor* (1876), 4 Ch. D. 157.

(*a*) *Re Taylor* (1840), 11 Sim. 178. It is not, however, necessary for the wife to show that she is entitled to a divorce or judicial separation. *Exp. Bartlett* (1846), 2 Coll. 661.

(*b*) *Shillito v. Collett* (1860), 8 W. R. 683.

(*c*) *Re Winscom* (1865), 2 H. & M. 540.

(*d*) 20 & 21 Vict. c. 85, s. 35. As to custody, maintenance and education of children in cases of applications for restitution of conjugal rights, see the Matrimonial Causes Act, 1884.

(*e*) 22 & 23 Vict. c. 61, s. 4; see also the Matrimonial Causes Act, 1884.

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2 Edw. VII.
c. 28.

It is also enacted by sect. 5 (sub-s. (2) (b)) of the Licensing Act, 1902 (which relates to parents who are habitual drunkards), that a Court of summary jurisdiction may award to any successful applicant for relief under that section, the legal custody of any children of the marriage.

The Court follows the same principles as when acting under its general jurisdiction.

Acting under sect. 35 of the Act of 1857, and sect. 4 of the Act of 1859, the Court is guided by the same principles as when it proceeds under its general jurisdiction, regarding, in the first place, the paternal right, then the marital duty, and thirdly the interest of the children.

When children will be given to mother.

"When parents cease to live together, the legal right to the custody of children of this age (eight and ten) is with the father. But the Court has power to infringe upon this right, and, when the common home has been broken up by the conduct of the father, it frequently exercises its power in favour of the injured mother" (*f*). Thus, where the conduct of the wife has been blameless, the custody of the children has been in several cases confided to her (*g*). But the rule is not an inflexible one, and the Court has the widest and most general discretion, and must consider "all the circumstances of the particular case before it; the circumstances of the misconduct which leads to a separation, no doubt; the circumstances of the general character of the father; the circumstances of the general character of the mother; and, above all, it should be the duty of the Court to look to the interests of the children" (*h*).

In this case the husband had not continued to lead an immoral life, and had the character of a religious and upright man, and it was considered that the male children would not be

(*f*) Per Lord Penzance in *Chetwynd v. Chetwynd* (1865), L. R., 1 P. & M. 39.

(*g*) *Marsh v. Marsh* (1858), 1 Sw. & Tr. 312; *Suggate v. Suggate* (1859),

1 Sw. & Tr. 492; *Boynston v. Boynston* (1861), 2 Sw. & Tr. 275.

(*h*) Per Lord Cairns, L. C., in *Symington v. Symington* (1875), L. R., 2 H. L. Sc. 415, 420.

injured if left in their father's custody; but that the female children should be handed over to the mother, "against whom nothing had been proved." Chap. XIII.

But where after a decree for dissolution of marriage upon the wife's petition, it was proved that she was no longer a fit person to have charge of her daughter, the Court made a fresh order transferring the custody of the infant to the father, who had married again and was shown to be living a respectable life (i). Variation of order of Court.

In another case (k), after a decree absolute had been pronounced for the dissolution of a marriage, on the ground of the husband's adultery and cruelty, applications were made for the custody of the infant children of the marriage by their father and mother, and by third persons, who had been allowed to intervene for the benefit of the children. The Court, being of opinion that neither the father nor the mother were, according to the evidence given at the hearing of the cause, fit to be entrusted with the care and custody of the children, gave the custody of them to the interveners, relatives of the husband, but directed that the parents should be allowed reasonable access (l). When to relations or strangers.

Where the wife had obtained a decree of judicial separation, and applied for the custody of the children, with the avowed purpose of bringing them up in a religion different from that of their father, and different from that in which they had been educated during the cohabitation of their parents, the Court rejected the application, and placed the children in the custody of a third person, providing, at the same time, that both parents should have access to them (m).

After the dissolution of the marriage, on the ground of the wife's adultery, the custody of the children will not, without strong reasons, be taken from the husband; and the Court views with disfavour the employment of detectives, for the purpose of getting up a case of immorality against a man who is leading "a notoriously respectable life" (n).

(i) *Witt v. Witt*, (1891) P. 368.

(m) *D'Alton v. D'Alton* (1878), 4

(k) *Chetwynd v. Chetwynd* (1865), P. D. 87.

L. R., 1 P. & M. 39.

(n) *March v. March* (1867), L. R.,

(l) *Handley v. Handley*, (1891) P. 1 P. & M. 437.

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In a pending suit against the wife, adultery being charged and denied, the Court ordered the children, who were of tender years, to be delivered to her, on the grounds (1) that her health was suffering from being deprived of her children; and (2) that the children were in fact not in the custody of their father but of a stranger (*o*).

The Court assumes jurisdiction over the custody of children under the Divorce Acts until they attain the age of sixteen years (*p*).

During the coverture the father possesses, as against the mother, an absolute right to the custody and control of the children of the marriage. This right, which is coupled with a duty, the law does not permit him to surrender by ante-nuptial agreement; and, until the legislature interfered, it was likewise considered contrary to public policy that he should contract by a separation deed to give up the children to their mother. Except in cases of outrageous misconduct on his part—misconduct disqualifying him from having the custody of any child—the Court never interferes with “this sacred right.” The father’s control outlasts his life; and the nature and extent of this posthumous influence will now be briefly considered.

The father’s control over the children extends beyond his life.

III. *The rights and liabilities after the death of the husband.*

The father can by will, or “by a testamentary instrument in the form of a deed” (*q*), appoint guardians of his children to act until they respectively attain the age of twenty-one years (*r*), and the mother has no right to claim the custody of her children as against the person so appointed. Thus, Lord Cottenham in a celebrated case (*s*) said:—

Custody: the father’s power to appoint guardians.

“It is proper that mothers of children thus circumstanced should know that they have no right as such to interfere with testamentary guardians;

(*o*) *Barnes v. Barnes* (1867), L. R., 1 P. & M. 463. See also *Cartlidge v. Cartlidge* (1862), 2 Sw. & Tr. 567.

(*p*) *Mallinson v. Mallinson* (1866), L. R., 1 P. & M. 221.

(*q*) *Exp. Earl of Ilchester* (1803), 7 Ves. 348, 367.

(*r*) 12 Car. II. c. 24; this statute authorises a surviving guardian, if so directed by the will, to nominate a person, to act with him, in place of one deceased. *Parnell, In goods of* (1872), 41 L. J. P. 35.

(*s*) *Talbot v. Earl of Shrewsbury* (1840), 4 My. & Cr. 672, 683.

and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the Court has of controlling the power of testamentary guardians." Chap. XIII.

The testamentary guardian may recover possession of his ward by writ of *habeas corpus*, which the Court has no discretion to refuse if the guardian be a fit and proper person, and the infant too young to choose for itself (*t*).

The position, however, of the testamentary guardian is entirely different from that of the father. The right given to him is the right of tuition and custody under the Act of Parliament. It is given to him as a trust to be exercised, and the Court will interfere with his discretion in exercising that trust in a way in which it will never interfere with the discretion of a father (*u*).

Several persons may be appointed joint guardians, and, in such a case, the office survives on the death of one (*x*). A father can also authorize the survivors to nominate a person to act in the place of a deceased guardian (*y*). The immediate custody of the children may be confided by the testator to persons other than the testamentary guardians; and words of recommendation, though not amounting to an imperative direction, will be regarded by the Court in settling a scheme for the education and management of the children (*z*). The marriage of a female guardian does not determine her guardianship; but, on the happening of such an event, application should be made to the Court "to ascertain what ought to be done under the altered state of circumstances" (*a*); and nothing in modern legislation seems to effect this.

It may be mentioned that the mother has no power under 12 Car. II. c. 24, to appoint guardians; but if she, being a widow, The mother has no power to appoint guardians.

(*t*) *Re Andrews* (1873), L. R., 8 *bury* (1722), 2 P. Wms. 103.

Q. B. 153. See also *Wright v. Naylor* (1820), 5 Mad. 77. (*y*) *In the Goods of Parnell* (1872), L. R., 2 P. & M. 379.

(*u*) Per Cotton, L. J., in *Re Agar-Ellis* (1883), 24 Ch. D. 317, 332. (*z*) *Knott v. Cottee* (1847), 2 Phil. 192.

See also *Jones v. Powell* (1846), 9 Beav. 345. (*a*) *Jones v. Powell* (1846), 9 Beav. 345.

(*x*) *Eyre v. Countess of Shaftes-*

<u>Chap. XIII.</u>	purports to make such an appointment, the Court in selecting guardians will in general appoint her nominees (b).
The mother, when guardian.	If no testamentary guardians are appointed by the father, the mother becomes on his death guardian of her children by "nature and nurture" (c). This guardianship terminates at fourteen years of age as to both males and females.
Mother may appoint guardians under 49 & 50 Vict. c. 27.	The power of appointing guardians by deed or will to act after the decease of herself and her husband, is, however, expressly conferred upon a mother by sect. 3, sub-sect. 1, of the Guardianship of Infants Act, 1886 (d).
Fornication of widow.	Where, in accordance with the will of her late husband, a widow duly maintained and educated the children of the marriage, but at the same time lived in adultery with a married man, it was decided that her personal immorality constituted such a breach of trust as would enable the Court to administer the estate (e).
Religious education.	Intimately connected with the subject of the custody and guardianship of children is that of their religious education; and as questions frequently arise, after the death of the father, regarding the faith in which his children are to be brought up, it is fit that the leading principles which govern these cases should be here stated.
Father's religion to be followed.	"The rule of the Court is, that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been" (f); and this rule is unaffected by the Guardianship of Infants Act, 1886 (g).

(b) *Re Kaye* (1866), L. R., 1 Ch. 387.

(c) *Roach v. Garvan* (1748), 1 Ves. sen. 157. See further, as to the position of the mother, *Villareal v. Mellish* (1819), 2 Swanst. 533.

(d) *G.* (an infant), *In re*, (1892) 1 Ch. 292.

(e) *G.*, *In re* (infants), (1899) 1

Ch. 719.

(f) Per Lord Justice James in *Hawksworth v. Hawksworth* (1871), L. R., 6 Ch. 541. See also *Re Besant* (1879), 11 Ch. D. at p. 519; for an exception, see *McGrath, In re*, (1893) 1 Ch. 143, C. A.

(g) *Scanlan, In re* (1888), 40 Ch. D. 200.

The father has not, indeed, the same absolute right to prescribe after his own death a form of faith for his child, as to dispose of the custody of its person. But, as Lord Cottenham remarks, "although the father has not the power of regulating, after his death, the faith in which his child should be brought up, the Court will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of that faith" (*h*).

There seem to be two classes of cases in which the rule *religio sequitur patrem* is infringed:—(1) Where the father has in his lifetime abdicated his rights; (2) where, after his death, the child has been so long brought up in another religion as to have acquired a knowledge of its distinctive tenets.

When this rule is infringed.

A father may, by his acts, altogether abdicate the right of controlling the religious education of his children, and entrust it to his wife, a person of a different religious persuasion (*i*). In that event, it seems that the Court will not treat as imperative the directions in the father's will, that the children must be brought up in his own faith (*k*).

i. Abdication of his rights during his lifetime.

An ante-nuptial agreement that the children shall be brought up in a different religion from that of their father is, as we have seen, not binding upon the father (*l*); but, after his death, such an agreement will be entitled to weight in the determination of the question, whether the father has abandoned his right to prescribe the religion in which his children shall be educated (*m*). The circumstance that a child has been, with his father's knowledge, baptized in a different religion from his own is one to which much importance will be attached (*n*).

The second class of cases which are an exception to the general rule, is where a child has, by the time the application

ii. Acquisition of fixed religious principles.

(*h*) *Talbot v. Earl of Shrewsbury* (1840), 4 My. & Cr. 672, 686. See also *Hill v. Hill* (1862), 10 W. R. 400; *Re Newbery* (1866), L. R., 1 Ch. 263.

(*i*) *Clarke, In re* (1882), 21 Ch. D. 817. See also *Newton, In re*, (1896) 1 Ch. 740, C. A.

(*k*) *Hill v. Hill* (1862), 10 W. R. 400.

(*l*) *Ante*, pp. 424-5; and see *Re Meades* (1871), Ir. Rep., 5 Eq. 98.

(*m*) *Andrews v. Salt* (1873), L. R., 8 Ch. 622; *Re Clarke* (1882), 21 Ch. D. 817.

(*n*) *Hill v. Hill* (1862), 10 W. R. 400.

Chap. XIII. has been made to the Court, received and formed fixed religious impressions and convictions which it would not be expedient to eradicate. Thus, in *Stourton v. Stourton* (o), the facts were as follows:—The Hon. John Stourton, in May, 1846, married a lady who, like himself, was a Roman Catholic. In about a year after the marriage Mr. Stourton died intestate, and soon after his death a son was born, and was baptized as a Roman Catholic. Mrs. Stourton, however, very soon became a member of the Church of England, and trained her child in the same faith. It was not until he had attained the age of nine years that application was made to the Court; and the Lords Justices, having ascertained, from a personal interview with the infant, that he had imbibed definite religious principles, determined that he was to remain in his mother's custody, that she was to be his sole guardian, and that she was to be at liberty to continue his Protestant education.

The course pursued in *Stourton v. Stourton* of privately examining into the religious opinions of the child has been disapproved, and it may be safely asserted that it will not be adopted except as a last resort. "It appeared in that case, upon the examination of that poor child, who was nine years and-a-half old, that his intellect had been precociously excited, and he had been prematurely instructed by a proselytising mother in those matters of religious difference between the two Churches, which it was certainly most dangerous and most improper to endeavour to introduce into the mind of a child of those tender years; and I, for one, should be loth to do anything which could operate as the slightest encouragement to persons, whether mothers or not, who obtain access to young children, to begin the task of proselytising, when they are of too tender an age to be disturbed by those religious controversies, by which the adult world is so much distracted. I therefore decline myself to endeavour, by probing this child's mind, to ascertain whether the mother has done what there is no suggestion that she has done, namely, whether she has violated her duty to the

child, by endeavouring to impress upon her the peculiar differences between the two religions" (*p*). Chap. XIII.

It has been held in a modern case by the Court of Appeal (*q*), where the widowed mother of young children, without changing her own religion, married a second husband of a different faith, that the mere fact of such a marriage was not of itself sufficient to justify the Court in interfering, so long as there was no personal misconduct or intermeddling with the proper bringing up of the child. Rights of mother who has changed religion.

But, on the other hand, where the widow on her re-marriage abjured the faith of her first husband and adopted that of her second, and, after parting with the children on the death of her first spouse, sought, upon her second marriage, to recover them, with the avowed intention of bringing them up in her new faith, the Court refused the mother's application on *habeas corpus* for a transfer to her of the custody of the infants (*r*).

It is almost needless to point out that the Court, in its decisions on these difficult cases, divests itself as far as possible of any bias in favour of any particular religion (*s*). It has been said: "It is the duty of the Court to take care that a fatherless ward is brought up in the religion of the father. . . . It would be impossible for the Court to allow its ward, a Christian child, the child of a Christian father, baptized in the Christian Church, to remain under the guardianship and control of a person who professes and teaches and promulgates the religious, or anti-religious, opinions which the appellant avows that she professes and intends to persevere in teaching and promulgating. . . . In the absence of the father, the Court is the real guardian of the infant, and must perform its duty to the ward accordingly, and, if necessary, wholly irrespective of the convictions or wishes of the mother, and by separating the child from her. It is a plain,

(*p*) Per Lord Justice James, in *Hawksworth v. Hawksworth* (1871), L. R., 6 Ch. 539, 543. See also *Re Agar-Ellis* (1878), 10 Ch. D. 49, 74.

(*q*) *X.*, *In re*, (1899) 1 Ch. 526, C. A.

(*r*) *Grey*, *In re* (infants), (1902)

2 Ir. B. 684; *Skinner v. Orde* (1871), L. R., 4 P. C. 60.

(*s*) *Lyons v. Blenkin* (1820), Jac. 245; *Davis v. Davis* (1862), 10 W. R. 245; *Austin v. Austin* (1865), 4 De G., J. & S. 716; *Andrews v. Salt* (1873), L. R., 8 Ch. 622; *In re Clarke* (1882), 21 Ch. D. 817.

Chap. XIII. imperative duty which the law casts on the Court; it is the plainest right of the infant ward. The same duty and the same right would exist if the child were the child of a Jew, a Parsee, a Mahomedan, or a Buddhist" (t).

Illegitimate children.

In the case of illegitimate children the mother has an inalienable right to the custody. And in the absence of it being shown that anything detrimental to the interests of the child will result from her guardianship, her wishes will be primarily considered by the Court.

Consequently, even where the mother has parted with the possession of the child to third parties for a lengthened period, the Court will assist her to recover possession of her child (u).

Nor is a person with whom an illegitimate child has been boarded by its mother entitled to retain the custody of the child in security of arrears of aliment alleged to be due from the mother (x).

But, on the other hand, a contract between the mother of an illegitimate child and a third party, for the transfer to that person of the rights and liabilities of the mother, in respect of the child is invalid, and consequently damages for breach of contract by the alleged transferee are not recoverable (y). Upon the marriage of a man with the mother of illegitimate children responsibility for their maintenance devolves upon the husband, until they attain the age of sixteen years, or until the death of the mother (z).

(t) Per Lord Justice James in <i>Re Besant</i> (1879), 11 Ch. D. p. 519.	10, Ct. of Sess.
(u) <i>Rex v. New</i> (1904), 20 T. L. R. 583, C. A.	(y) <i>Humphreys v. Polak</i> , (1901) 2 K. B. 385, C. A.
(x) <i>Kerrigan v. Hall</i> (1901), 4 F.	(z) Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 57.

CHAPTER XIV.

PRACTICE.

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THE rule of common law was, as has been seen, that a wife could not, during coverture, save in a few excepted cases, sue or be sued alone; it was necessary that her husband should be joined in the action, and if the husband wished to maintain an action on contracts made by his wife before marriage, or on contracts made by her as an administratrix, he was obliged to join her as a co-plaintiff (a); but he could sue either alone or jointly with his wife on negotiable instruments given her before

Formerly a husband must join his wife in an action for causes of action affecting her.

(a) *Burdick v. Garrick* (1870), L. R., 5 Ch. 233.

Chap. XIV. marriage, on rights acquired by her after marriage, and on contracts made with himself and his wife after marriage.

For causes of action arising out of injuries to the person or property of the wife committed before or during marriage, and for injuries for which the wife had to sue in a representative character, the husband and wife were formerly obliged to sue jointly.

Cases in which the wife could sue alone.

But a married woman could always sue alone, when her husband was civilly dead; when he had abjured the realm; when she had obtained a decree of judicial separation under 20 & 21 Vict. c. 85, s. 26, or a protection order under sect. 21 of the same statute: and, by the custom of London, when she was trading alone within the city. She could also sue alone when seeking relief in the Ecclesiastical or Divorce Courts.

The practice in Chancery.

In the old Court of Chancery, a husband who sought to recover property of his wife had, as a rule, to join her as a party, and to make her a co-plaintiff; and where he sued for this purpose, or where he sued as her next friend, the action was considered as his alone (*b*).

When a married woman could sue by her next friend.

Where a married woman wished to raise the question of her equity to a settlement, or if she wished to sue her husband or any other person in respect of her separate property, she had to sue by her next friend (*c*).

If her husband had an interest in such property, or if he had no adverse interest, he might be made a co-plaintiff (*d*); but, generally, in a suit relating to property given to the wife for her separate use, the husband was treated as having an adverse interest, and then he was made a defendant (*e*). If the authority of the next friend was challenged, he was obliged to produce it (*f*).

(*b*) *Wake v. Parker* (1838), 2 Keen, 59.

(*e*) *Roberts v. Evans* (1878), 7 Ch. D. 830.

(*c*) *Davis v. Prout* (1843), 7 Beav. 288; *Woodward v. Woodward* (1863), 3 De Gex, J. & S. 672.

(*f*) *Schjott v. Schjott* (1881), 19 Ch. D. 94. As to suits under the Partition Act, 1876 (39 & 40 Vict. c. 17), see *Wallace v. Greenwood* (1880), 16 Ch. D. 362; *Grange v. White* (1881), 18 Ch. D. 612.

(*d*) *Beardmore v. Gregory* (1865), 2 H. & M. 491.

The Married Women's Property Act, 1870, enabled a married woman to maintain an action in her own name for the recovery of any wages, earnings, money, and property declared by that Act to be her separate property, or of any property belonging to her before marriage which her husband might agree in writing should belong to her as her separate property; and it gave her in her own name the same remedies against all persons for the protection and security of her property, as if such property belonged to her as an unmarried woman (*g*). This statute, however, did not enable a married woman to be sued alone in respect of the separate property created by it, even though she carried on a separate trade (*h*).

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The Act of 1870 enabled her to sue alone in respect of property declared by that Act to be her separate property;

Section 12 of that Act made a wife liable to be sued for her debts contracted before marriage, and it was not necessary to join the husband in an action brought under that section to charge her separate property (*i*); but the amending Act of 1874 repealed those sections of the Act of 1870, and provided that a husband and wife married on or after July 30th, 1874, might be jointly sued for any debt of the wife contracted before marriage, limiting, however, the liability of the husband in any such action to the amount of certain assets received by him as specified in that Act (*k*); and in such an action against the husband and wife, it is not necessary for the plaintiff to state in his claim that the husband has received assets (*l*).

and to be sued alone for ante-nuptial debts.

The Act of 1874 re-imposed the liability of the husband to a certain extent.

The Married Women's Property Act, 1882, enacts, in sect. 1, sub-s. 2, that a married woman shall be capable—

The Act of 1882 enables a married woman to sue and be sued as a *feme sole*.

“Of suing and being sued either in contract or in tort, or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her.”

(*g*) 33 & 34 Vict. c. 93, s. 11;
Moor v. Robinson (1879), 48 L. J. Rep., Q. B. 156; *Ramaden v. Brearley* (1875), L. R., 10 Q. B. 147; *Summers v. The City Bank* (1874), L. R., 9 C. P. 580.

(*h*) *Hancocks v. Lablache* (1878), 3 C. P. D. 197; *Attwood v. Chiches-*

ter (1878), 3 Q. B. D. 722.

(*i*) *Williams v. Mercier* (1882), 9 Q. B. D. 337.

(*k*) 37 & 38 Vict. c. 50, sects. 1 and 2.

(*l*) *Matthews v. Whittle* (1880), 13 Ch. D. 811.

Chap. XIV. And section 12 enacts that—

“ Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole* ; but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort ” (*m*).

How judgment is to be entered in an action brought against a husband and wife jointly.

The 15th section of the Married Women's Property Act, 1882, provides, that a husband and wife may be jointly sued in respect of any ante-nuptial debt or liability of the wife, if the plaintiff in the action seeks to establish his claim either wholly or in part against both of them ; and if in any such action, or in any action brought for such a cause of action against the husband alone, it is not found that the husband is liable in respect of any property of his wife acquired by him, or to which he has become entitled from or through his wife, he is to have judgment for the costs of his defence, whatever may be the result of the action against the wife if jointly sued with him ; and in any such action brought against the husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment, to the extent to which he is liable, is to be a joint judgment against the husband personally, and against the wife as to her separate property ; and as to the residue, if any, the judgment is to be a separate judgment against the wife as to her separate property only.

This section re-enacts the provisions of sections 3 and 4 of the repealed Act of 1874, and any action founded on a cause of action arising under that Act can still be brought under that Act.

Costs in such a case.

Where an action brought against a husband and wife jointly resulted in a judgment in favour of the husband, on the ground that he had never received any assets as specified in sect. 3 of 37 & 38 Vict. c. 50, the plaintiffs were held entitled to add the amount of the costs paid by them to him to the amount of the

(*m*) 45 & 46 Vict. c. 75, s. 12.

debt and costs for which they obtained judgment against the wife (*n*). Chap. XIV.

The Rules of the Supreme Court, 1875, contained provisions enabling a married woman to sue alone by leave; but these rules have been repealed, and the Rules of the Supreme Court, 1883 (*o*), which are now in force contain the provision, that "married women may sue and be sued as provided by the Married Women's Property Act, 1882." A married woman, therefore, can now sue or be sued alone, both in contract and in tort; and it has been decided in the case of *Weldon v. Winslow* (*p*), that, notwithstanding that the cause of action accrues before the passing of the Married Women's Property Act, 1882, a married woman is entitled in such a case to maintain an action of tort in her own name alone, and the right of action was not confined to torts committed after the passing of the Act. She can only sue her husband in tort (*q*) for the protection and security of her separate property; so that while the remedies given to her under sect. 12 with respect to her separate property are of the largest extent, it would seem that the general power given to her by sect. 1, sub-s. 2, to sue in tort is limited by this section as regards her husband; and that it is only in cases arising under sect. 12 that she can sue him in tort.

Provisions of the Rules of the Supreme Court, 1883.

A married woman can only sue her husband for the protection of her separate property.

Where, however, by virtue of sects. 12 and 16 of the Married Women's Property Act, 1882 (which constitute the wrongful taking of goods when absconding or deserting a criminal offence), either a husband or wife is liable to criminal proceedings at the instance of the other, should the accused be the wife of the prosecutor, it is not necessary for the indictment to contain an averment that the prisoner was the wife of the prosecutor (*r*).

When act of wife makes her liable to criminal proceedings.

The contractual powers, and consequent liability, of a married woman are considerably enhanced by the Married Women's

Liability of married woman for

(*n*) *London and Provincial Bank v. Bogle* (1878), 7 Ch. D. 773.

(*o*) R. S. C. 1883, Ord. XVI. r. 16.

(*p*) W. N. 1884, p. 184.

(*q*) 45 & 46 Vict. c. 75, s. 12.

(*r*) *Rex v. James*, (1902) 1 K. B.

540. As to the admissibility of the evidence of husband or wife against each other in such cases, see 46 & 47 Vict. c. 14.

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costs under
Act of 1893.

Property Act, 1893 (*s*). This Act provides, by sect. 2, that in any action or proceeding now or hereafter instituted by a married woman, or by a next friend on her behalf, the costs of such action or proceeding may be ordered to be paid out of property subject to restraint on anticipation; such payment to be enforced by the appointment of a receiver and the sale of the property, or otherwise as may be just (*t*).

Her position
as to security
for costs re-
sembles that
of any other
suitor.

A married woman, though now enabled to sue alone in her own name without obtaining leave, is not apparently in the same position with regard to giving security for costs as any other suitor, it having been decided that (except upon appeal (*u*)) she cannot be ordered to give security for the costs of the action, even although she have at the time of the action no separate estate, and there be nothing upon which, if she fails, the defendant can issue available execution (*x*).

It is submitted that the ruling of the Courts in this matter is open to serious exception, the immunity from giving security tending to promote vexatious litigation by irresponsible parties.

It has also been held, even in cases where, owing to her financial position, the security is illusory, upon the grant of an interlocutory injunction at the instance of a married woman, her sole undertaking as to damages must be accepted (*y*).

The right of a married woman, whose husband is alive, to bring an action under the Act of 1882 dates from the time when that Act came into force, so that the provisions of Statutes of Limitation begin to run as regards her cause of action from January 1, 1883 (*z*).

(*s*) 56 & 57 Vict. c. 63.

(*t*) As to the effect of this section and what constitutes "a proceeding," see *Dresel v. Ellis* (1905), W. N. 41, C. A.; *Hood-Barrs v. Heriot*, (1897) A. C. 177; *Hood-Barrs v. Cathcart*, (1894) 3 Ch. 376; *Crickitt v. Crickitt*, (1902) P. 177, C. A.; *Gordon v. Gordon*, (1904) P. 163, C. A.; *Nunn v. Tyson*, (1901) 2 K. B. 487; *Moran v. Place*, (1896)

P. 214, C. A.

(*u*) *Whittaker v. Kershaw* (1890), 44 Ch. D. 296, C. A.

(*x*) *Isaac, In re* (1885), 30 Ch. D. 418; *Threlfall v. Wilson* (1883), 8 P. D. 18.

(*y*) *Pike v. Cave* (1893), 68 L. T. 450.

(*z*) *Weldon v. Neal* (1884), 32 W. R. 828.

If a husband and wife are both defendants to an action, they must both be served, unless the Court or judge orders otherwise (*b*). But in an action against a husband and wife jointly, for a tort committed by the latter, it is an inadmissible mode of pleading for the husband to make a payment into Court in satisfaction of the claim, and for the wife to plead a denial of liability (*c*).

A cause or matter does not abate by reason of the marriage of any of the parties, if the cause of action continues, and in the case of the marriage of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband be made a party, or be served with notice in the manner prescribed by the Rules of Court, on such terms as may be thought just (*d*). Claims by or against a husband or wife may be joined with claims by or against either of them separately (*e*).

Where a husband is entitled or liable to execution upon a judgment or order for or against a wife, the party alleging himself entitled to execution may apply for leave to issue execution accordingly, and an order may be made, or an issue may be directed to determine the rights of the parties, which may be tried in any of the ways in which an action may be tried (*f*).

No special case in any cause or matter to which a married woman (not being a party thereto in respect of her separate property, or of any separate right of action by or against her) is a party shall be set down for argument without leave, the application for which must be supported by sufficient evidence, that the statements contained in such special case, so far as the same affect the interest of the married woman, are true (*g*). This application is now usually made by summons in chambers (*h*).

(*b*) R. S. C. 1883, Ord. IX. r. 3.

(*c*) *Beaumont v. Kaye*, (1904) 1 K. B. 292, C. A.

(*d*) R. S. C. 1883, Ord. XVII. rr. 1 and 2.

(*e*) R. S. C. 1883, Ord. XVIII. r. 4.

(*f*) R. S. C. 1883, Ord. XLII.

r. 23.

(*g*) R. S. C. 1883, Ord. XXXIV.

r. 4.

(*h*) R. S. C. 1883, Ord. LV. r. 2

(17).

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Order for final judgment by default or under Order XIV. may now be made against a married woman.

It was held, prior to the passing of the Act of 1882, that an order to sign final judgment under Ord. XIV. r. 1, could not be made against a married woman, and that the Court could only order an inquiry as to the existence of separate estate chargeable with the sum claimed (*i*); but this is not so now, and such judgment may be satisfied by a garnishee order attaching a sum of money due to the married woman as damages (*k*), although as the judgment against a married woman is *not* a personal judgment, but one against her separate estate, there is no power, under sect. 5 of the Debtors Act, 1869, to commit to prison a married woman for her default in paying a sum for which judgment has been recovered against her (*l*). Nor, in the case of a debt contracted before marriage, can a judgment against a married woman be enforced by way of equitable execution against her separate property subject to a restriction against anticipation (*m*).

And where a married woman is entitled to property held in trust for her separate use, without power of anticipation, judgment against her does not entitle the judgment creditor to attach income in the hands of the trustees accrued since the date of the judgment (*n*). Since the Act of 1882, an order for final judgment has been made in Ireland on a specially indorsed writ, in an action brought against a married woman alone for the price of goods supplied to her, the order made giving leave to the plaintiff to sign final judgment for the amount indorsed on the writ, and for the costs of the suit and the motion (*o*). It has also been decided that the words in sect. 1, sub-sect. 2, of the Act of 1882, "in respect of and to the extent of her separate property," do not limit the effect of the rest of the subsection, so that a married woman can both sue and be sued to judgment, and judgment by default, or under Ord. XIV., can

(*i*) *Durrant v. Ricketts* (1881), 8 Q. B. D. 177.

(*k*) *Holtby v. Hodgson* (1889), 24 Q. B. D. 103, C. A.

(*l*) *Scott v. Morley* (1887), 20 Q. B. D. 120, C. A.; *Turnbull, In re*, (1900) 1 Ch. 180.

(*m*) *Birmingham Excelsior Money*

Co. v. Lane, (1904) 1 K. B. 35, C. A.

(*n*) *Bolitho & Co. v. Gidley* (1905), W. N. 34, H. L. (E.). See also *Whiteley v. Edwards*, (1896) 2 Q. B. 48.

(*o*) *Brown v. Morgan* (1883), 12 Ir. C. L. Rep. 122.

be signed against her, or a receiver may be appointed, in respect of her separate property which is not subject to restraint on anticipation, for that is the property against which execution can issue and be enforced (*p*). Nor, in every case, is the issue of execution limited to property not subject to restraint on anticipation; for (although the saving for existing settlements made by third parties, and the power to make future settlements by such persons conferred by sect. 19 of the Act of 1882 strictly limits the liability of a married woman to her separate property not subject to restraint) the second clause of sect. 19, beginning "but no restriction," renders ineffectual as against creditors any settlement, or agreement for a settlement, of a woman's own property to be made or entered into by herself (*q*).

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Where a married woman is liable for costs, to be paid out of her separate estate, the Court has jurisdiction to protect by injunction, or the appointment of a receiver, the fund out of which the costs are payable (*r*).

Procedure
for recovery
of costs.

Where a surety, who was sued upon a guarantee which he had given for the debt of a married woman, served a third party notice on her, and she appeared, an order for judgment was made upon her under Ord. XVI. r. 52 (*s*). As a married woman can now sue in her own name, she is also entitled to be a petitioning creditor in bankruptcy; for, as a general rule, a person who is entitled to take proceedings to recover a debt can present a creditor's petition.

A married
woman can be
a petitioning
creditor.

A married woman can be made a bankrupt if she is carrying on a trade separately from her husband (*t*), but apparently not in other cases (*u*).

Where a married woman, entitled to separate estate with a restraint on anticipation, trades separately from her husband

(*p*) *Bursill v. Tanner* (1884), 50 L. T. (N. S.) 589; *Perks v. Mylrea*, W. N. 1884, p. 64.

(*q*) *Johnstone v. Broune* (1886), 18 L. R., Ir. 428.

(*r*) *Cummins v. Perkins*, (1899) 1 Ch. 16, C. A.

(*s*) *Gloucestershire Banking Co. v. Phillips* (1884), 12 Q. B. D. 533.

(*t*) *Worsley, In re*, (1901) 1 Q. B. 309.

(*u*) *A Debtor, In re*, (1898) 2 Q. B. 576, C. A.

Chap. XIV. and becomes bankrupt, her separate estate subject to the restraint, on the death of her husband in her lifetime, vests in her trustee in bankruptcy (x).

Liability
under
Debtors Act,
1869.

A married woman could always be arrested under a *ca. sa.*, but if she had no separate property she was entitled to her discharge (y). The Debtors Act of 1869 (z) applied to married women, so that an order for commitment was made in a case in which a married woman did not plead her coverture (a). And although under the Married Women's Property Acts the liability of a married woman in respect of her contracts (which term includes the acceptance of the office of trustee, or executrix or administratrix) is a proprietary and not a personal one, it has been held, that where a married woman administratrix mixed trust funds with her own moneys, and refused to comply with an order for their payment into Court, the Court has jurisdiction to attach her person for the contempt (b).

Where the separate property of the wife was concerned, the Court of Chancery could enforce its orders and decrees against a married woman (c).

May take
criminal
proceedings.

By sect. 12 of the Act of 1882 (d), every woman, whether married before or after the Act, has against all persons whomsoever (but subject, as regards her husband, to a restriction) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if she were a *feme sole*, and in any indictment or other proceeding it will be sufficient to allege the property concerning which the proceeding is taken to be her property, and in any proceeding under this section a husband or wife "shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding." Sect. 16 enacts that "a wife doing

(x) *Wheeler's Settlement Trusts*, *In re*, (1899) 2 Ch. 717.

(y) *Ivens v. Butler* (1857), 7 E. & B. 159; 26 L. J., Q. B. 145; *Jay v. Amphlett* (1863), 32 L. J., Ex. 176; *Larkin v. Marshall* (1850), 4 Ex. 804.

(z) 32 & 33 Vict. c. 62.

(a) *Dillon v. Cunningham* (1872), L. R., 8 Ex. 23.

(b) *Turnbull, In re*, (1900) 1 Ch. 180.

(c) *Hope v. Carnegie* (1868), L. R., 7 Eq. 254.

(d) 45 & 46 Vict. c. 75, s. 12.

any act with respect to any property of her husband which, if done by the husband with respect to the property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband" (e). It having been decided that these two sections did not enable a husband to give evidence against his wife in criminal proceedings instituted by him against her under sect. 16 (f), an amending Act was passed in the session of 1884, which has the effect of placing husbands and wives on the same footing in this respect (g).

The Married Women's Property Act of 1870 (h) contained, and the Act of 1882 (i) contains, provisions for determining, in a summary way, questions which may arise between the husband and wife as to the title to or possession of property.

Disputes as to the title to or possession of property arising between husband and wife may be determined in a summary manner.

The Act of 1870 limited this mode of proceeding to property declared by that Act to be the separate property of the wife, but the provisions of sect. 17 of the Act of 1882 are more extensive, so that they practically supersede the provisions of the earlier statute, for this section of the Act of 1882 applies to all persons whenever married. Where property is bought by a husband, in his own name, with moneys belonging to the wife, the presumption is raised of a resulting trust in favour of the wife (k).

Sect. 22 of the Act of 1882 provides that a husband or wife, married before the Act came into force, can sue and be sued under the provisions of the repealed Act of 1870, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of the Act, so that in the case of a marriage celebrated before the 9th of August, 1870, either party can apply under sect. 9 of the Act of 1870 with respect to any property declared by that Act to be the separate property of the wife, if

(e) Sect. 16; and see *Rex v. James*, (1902) 1 K. B. 540, C. C. R.

(f) *R. v. Brittleton* (1884), 12 Q. B. D. 266.

(g) 47 & 48 Vict. c. 14.

(h) 33 & 34 Vict. c. 93, s. 9.

(i) 45 & 46 Vict. c. 75, s. 17.

(k) *Mercier v. Mercier*, (1903) 2

Ch. 98.

Chap. XIV. the right or liability accrued before the Act of 1882 came into force.

Act of 1882,
s. 17.

Sect. 17 of the Act of 1882 enacts that, "in any question between husband and wife as to the title to or possession of property," either party, or any bank, corporation, company, public body, or society in whose books any stocks, funds, or shares of either party are standing, may apply, by summons or otherwise, in a summary way, to any judge of the High Court, or at option, and irrespective of the value of the property in dispute in England, to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides; and the judge or chairman to whom the application is made may make such order with respect to the property in dispute, and direct any such inquiry touching the matters in question, as he shall think fit.

Any such order is to be subject to appeal; and if the application is made in a County or Civil Bill Court in a matter in which, owing to the value of the property in dispute, the Court would not, but for the provisions of the Acts of 1870 and 1882, have had jurisdiction, the defendant can as of right remove the proceedings into the High Court.

Any application under this section may, at the request of either party, be heard in private.

Any bank, corporation, company, public body, or society in whose books any stocks, funds, or shares of either party are standing, is, in the matter of any such application, to be, for the purposes of costs or otherwise, treated as a stakeholder only.

The County Court Rules, 1903, provide:—

"(1) An application to the Court for the appointment of a trustee or new trustee under sect. 11 of the Married Women's Property Act, 1882, shall be made by petition, and the same procedure shall be followed and costs allowed as on any other petition to the Court, regard being had to the amount of the subject-matter of the petition.

"(2) Where application is made under sect. 17 of the Married Women's Property Act, 1882, particulars of the question to be submitted to the decision of the Court shall be filed . . . and a summons issued.

"All subsequent proceedings shall be had as if the proceeding had been commenced by the entry of a plaint, and the procedure shall be deemed to be a plaint."

By sect. 23, the legal personal representative of a married woman has, in respect of her separate estate, the same rights and liabilities and is subject to the same jurisdiction as she would be if she were living, so that the legal personal representative will, in respect of matters arising under sect. 17, be able to apply in the manner provided by that section. The jurisdiction of County Courts is limited by various statutes, notably by the County Court Acts, 1888 and 1903 (*l*), but the limit differs according to the subject-matter. In most personal actions the limit is fixed at 100*l.*; in actions affecting the title to real property the annual value of the property must not exceed 100*l.*; in actions relating to mortgages, the amount of the debt, and in actions for the administration of estates the value of the property must not exceed 500*l.*, and that amount is the limit of the jurisdiction of the County Court in actions for specific performance, for the delivering up or cancelling any agreement for sale, for the execution of trusts, for payment into Court by trustees, for foreclosure and redemption, for relief against fraud and mistake, for maintenance and advancement of infants, in actions relating to partnership, in actions under the Partition Act, 1868, and in cases under the Judicial Trustees Act, 1896, and (presumably) under the Trustee Act, 1893.

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Rights of the legal personal representative under this section.

Limits of County Court jurisdiction apart from the Act.

The position of the stakeholder in applications made under this section somewhat resembles that of a sheriff or other person entitled to take out an interpleader summons.

Position of stakeholder;

Moreover, it is provided by the Rules of the Supreme Court (*m*) that—

right to relief by way of interpleader.

“Relief by way of interpleader may be granted—(a) where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto.”

And further, by Ord. LVII. r. 8, that—

Summary procedure.

“The Court or a judge may, with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject-

(*l*) 51 & 52 Vict. c. 43, and 3 Ed. 7, c. 42.

(*m*) Ord. LVII. r. 1.

Chap. XIV. matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just" (n).

It would seem, therefore, that the bank or other public body mentioned in the section will be able to apply in a summary manner under sect. 17 of the Act; and that the fact of its having accepted property from a husband or a wife will not prevent it from so applying, when a dispute arises between the husband and the wife as to the title to or the possession of the property: for, unlike an ordinary bailee, such a body can allege that the husband or wife, as the case may be, has set up a claim to the property, and it will not be necessary for it to prove a title paramount existing in the claimant (o).

(n) Ordinarily this summary procedure is limited to cases where the subject-matter is under 50l. *Van Laun & Co. v. Baring Bros.*, (1903) 2 K. B. 277, at p. 281; but see

Harbottle v. Roberts (1905), W. N. 31, C. A.

(o) *Biddle v. Bond* (1865), 6 B. & S. 225; *Exp. Davies* (1881), 19 Ch. D. 86; and see *Mersey Docks, &c., Exp.*, (1899) 1 Q. B. 546, C. A.

APPENDIX.

THE MARRIED WOMEN'S PROPERTY ACT, 1882.

45 & 46 VICT. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act, 1870":

Be it enacted . . . as follows :—

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

Married woman to be capable of holding property and of contracting as a *feme sole*.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) [Repealed by Married Women's Property Act, 1893. See *post*.] *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.*

(4.) [Repealed by Married Women's Property Act, 1893. See *post*.] *Every contract entered into by a married woman with respect to and*

to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

Property of a woman married after the Act to be held by her as a *feme sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

As to stock, &c. to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company

of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

As to stock,
&c. to be
transferred,
&c. to a mar-
ried woman.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of

Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

Investments
in joint names
of married
women and
others.

8. All the provisions hereinbefore contained as to deposits in any post-office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock,
&c. standing
in the joint
names of a
married
woman and
others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent
investments
with money
of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture or debenture stock of any corporation, company or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the

dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

Moneys payable under policy of assurance not to form part of estate of the insured.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge

to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

Remedies
of married
woman for
protection and
security of
separate pro-
perty.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Wife's ante-
nuptial debts
and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which

she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Suits for ante-nuptial liabilities.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of

Act of wife liable to

criminal
proceedings.

the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions
between hus-
band and wife
as to property
to be decided
in a summary
way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides, and the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said Court would be; and any order of a County or Civil Bill Court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same Court would be, and all proceedings in a County Court or Civil Bill Court under this section in which, by reason of the value of the property in dispute, such Court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Married woman as an executrix or trustee.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Saving of existing settlements, and the power to make future settlements.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her husband.

31 & 32 Vict. c. 122.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93.
37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.



THE MARRIED WOMEN'S PROPERTY ACT, 1884.

47 & 48 VICT. c. 14.

An Act to amend the sixteenth section of the Married Women's Property Act, 1882. [23rd June, 1884.]

WHEREAS by section sixteen of the Married Women's Property Act, 1882, a wife is, under the circumstances therein mentioned, declared to be liable to criminal proceedings by her husband, and a doubt has arisen as to whether the husband is admissible as a witness against his wife in such criminal proceedings, while section twelve of the same Act declares that in any proceeding under that section a husband or wife shall be competent to give evidence against each other; and it is desirable that the said doubt should be removed, and the said Act otherwise amended:

Be it therefore enacted . . . as follows:

1. In any such criminal proceeding against a husband or a wife as is authorized by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence.

Husband or wife competent witness in criminal proceedings under 45 & 46 Vict. c. 75. Short title.

2. This Act may be cited as the Married Women's Property Act, 1884, and this Act and the Married Women's Property Act, 1882, may be cited together as the Married Women's Property Acts, 1882 and 1884.



THE SECTIONS OF THE FINES AND RECOVERIES ACT (3 & 4 WILL. IV. c. 74) RELATING TO ALIENATIONS BY MARRIED WOMEN WITH THEIR HUSBANDS' CONCURRENCE.

[As amended by subsequent legislation.]



An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.

[28th August, 1833.]

GENERAL ENABLING CLAUSE.

77. After the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case (except that of being tenant in tail, for which

A married woman, with her husband's concurrence,

may dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein: and may release and extinguish powers as a *feme sole*.

Not to extend to copyholds in certain cases.

provision is already made by this Act), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender or extinguish any estate which she alone, or she and her husband, in her right, may have in any lands of any tenure, or in any such money as aforesaid (a), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*; save and except that no such disposition, release, surrender or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this Act shall not extend to lands held by copy of Court-roll of or to which a married woman, or she and her husband, in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

(a) Contingent and other like interests and rights of entry, and disclaimers of interests of married women, are made alienable by deed under the 8 & 9 Vict. c. 106.

SAVING OF POWERS.

The powers of disposition given to a married woman by this Act not to interfere with any other powers.

78. Provided always, and be it further enacted, That the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently of this Act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

ACKNOWLEDGMENT OF DEEDS.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

79. That every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the Superior

Courts at Westminster, or before one (a) of the perpetual commissioners, or one (a) special commissioner, to be respectively appointed as hereinafter provided.

(a) By the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7, one commissioner is rendered sufficient. See this section, *post*, p. 475.

SEPARATE EXAMINATIONS.

80. That such judge or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender or extinguishment shall be made by her under this Act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed; and unless she freely and voluntarily consent to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

The judge, &c., before receiving such acknowledgment, to examine her apart from her husband.

PERPETUAL COMMISSIONERS.

81. That, for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

POWER OF PERPETUAL COMMISSIONERS.

Power of perpetual commissioners not confined to any particular place.

82. Provided always, That any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

SPECIAL COMMISSIONERS.

If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

83. That, in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this Act before a judge or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that Court, to issue a commission specially appointing any person therein named to be commissioner (a) to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said Court or judge shall think fit.

(a) By the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 7, one commissioner is rendered sufficient. See the section, *post*, p. 475.

MEMORANDUM OF ACKNOWLEDGMENT.

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned. Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the Court to make orders touching the examination,

84. That, when a married woman shall acknowledge any such deed as aforesaid, the judge, or commissioners taking such acknowledgment, shall sign a memorandum, to be endorsed on or written at the foot or in the margin of such deed.

POWER OF THE COURT OF COMMON PLEAS DEFINED.

89. And the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this Act, and touching the particular matters to be mentioned in such memorandums, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said Court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings,

matters, and things required by this Act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

memoranda, certificates, affidavits, &c.

COPYHOLDS—EQUITABLE INTERESTS.

90. That, in every case in which a husband and wife shall, either in or out of Court, surrender into the hands of the lord of a manor any lands held by copy of Court-roll, parcel of the manor, and in which she alone, or she and her husband, in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband, in her right, may be entitled in such lands, were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the persons taking the surrender, are hereby declared to be good and valid.

A married woman to be separately examined on the surrender of an equitable estate in copyholds as if such estate were legal.

THE CONVEYANCING ACT, 1882.

[As amended by subsequent legislation.]

45 & 46 VICT. c. 39.

An Act for further improving the Practice of Conveyancing, and for other purposes.

[10th August, 1882.]

Married Women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words “two of the perpetual commissioners, or two special commissioners,” the words “one of the perpetual commissioners, or one special commissioner;” and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word “persons” the word “person,” and for the word “commissioners” the words “a commissioner;” and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

Acknowledgment of deeds by married women.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court in England or Ireland, or before a judge of a County Court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such rules shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877.

39 & 40 Vict.
c. 59.
44 & 45 Vict.
c. 68.
40 & 41 Vict.
c. 57.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act, shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

SCHEDULE.

REPEALS.

- 3 & 4 Will. 4, c. 74, in part. The Fines and Recoveries Act, in part; namely,—
Section eighty-four, from and including the words "and the same judge," to the end of that section.
Sections eighty-five to eighty-eight, inclusive.
- 4 & 5 Will. 4, c. 92, in part. The Fines and Recoveries (Ireland) Act, in part; namely,—
Section seventy-five, from and including the words "and the same judge," to the end of that section.
Sections seventy-six to seventy-nine, inclusive.
- 17 & 18 Vict. c. 75. An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
- 41 & 42 Vict. c. 23. The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

20 & 21 VICT. c. 57.

An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate. [25th August, 1857.]

1. After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857, (except such a settlement as after mentioned,) and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a *feme sole*, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument by which she shall be restrained from alienating or affecting the same.

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. 4, c. 74, for disposing of interests in or powers over land in England or Wales.

In Ireland as by 4 & 5 Will. 4, c. 92.

2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this Act shall be acknowledged by her, and be otherwise perfected, in the manner in and by the Act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of this Act shall be acknowledged by her, and be otherwise perfected in the manner in and by the Act passed in the fourth and fifth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries and the Substitution of more simple Modes of Assurance in Ireland," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land: and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed of, released or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land.

The powers of disposition given by this Act not to interfere with any other powers.

3. Provided always, that the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently of this Act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

5. This Act shall not extend to Scotland.



THE DIVORCE AND MATRIMONIAL CAUSES ACT.

20 & 21 VICT. c. 85.

An Act to amend the Law relating to Divorce and Matrimonial Causes in England.

[28th August, 1857.]

21. A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the Court for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or Court, if satisfied of the fact of such desertion and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*: provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof: provided also, that if the husband or any creditor or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respect with regard to property and contracts, and suing and being sued as she would be under this Act if she obtained a decree of judicial separation.

Wife deserted by her husband may apply to a police magistrate or justices in petty sessions for protection.

25. In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon

In case of judicial separation the wife to be considered a *feme sole* with

respect to property she may acquire, &c.,

her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate.

also for purposes of contract and suing.

26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her or for any costs she may incur as plaintiff or defendant; provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use: provided also, that nothing shall prevent the wife from joining at any time during such separation, in the exercise of any joint power given to herself and her husband.

THE DIVORCE AND MATRIMONIAL CAUSES AMENDMENT ACT.

21 & 22 VICT. c. 108.

*An Act to amend the Act of the twentieth and twenty-first Victoria,
chapter eighty-five.* [2nd August, 1858.]

Provisions respecting property of wife to extend to property vested in her as executrix, &c.

7. The provisions contained in this Act and in the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

Order for protection of earnings, &c. of wife to be deemed valid.

8. In every case in which a wife shall under this Act or under the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, have obtained an order to protect her earnings or

property, or a decree for judicial separation, such order or decree shall until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had, in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the times of the making such order or decree and of the discharge, variation or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree.

THE SETTLED LAND ACT, 1882.

45 & 46 VICT. c. 38.

An Act for facilitating Sales, Leases and other Dispositions of Settled Land, and for promoting the execution of Improvements thereon. [10th August, 1882.]

I.—PRELIMINARY.

- 1.—(1.) This Act may be cited as the Settled Land Act, 1882. Short title ;
 (2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act. commence-
ment ;
 (3.) This Act does not extend to Scotland. extent.
- 61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman. Married
woman, how
to be affected.
 (2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.
 (3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.
 (4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman

without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

THE MATRIMONIAL CAUSES ACT, 1884.

47 & 48 VICT. c. 68.

An Act to amend the Matrimonial Causes Acts.

[14th August, 1884.

WHEREAS it is expedient to amend the law as to the restitution of conjugal rights in England:

Short title.

1. This Act may be cited as the Matrimonial Causes Act, 1884.

Periodical
payments in
lieu of at-
tachment.

2. From and after the passing of this Act a decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the Court may, at the time of making such decree, or at any time afterwards, order that in the event of such decree not being complied with within any time in that behalf limited by the Court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. The Court may, if it shall think fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such periodical payment, and for that purpose may refer it to any one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties.

Settlement
of wife's pro-
perty.

3. Where the application for restitution of conjugal rights is by the husband, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the Court may, if it shall think fit, order a settlement to be made to the satisfaction of the Court of such property, or any part thereof, for the benefit of the petitioner and of the children of the marriage, or either or any of

them, or may order such part as the Court may think reasonable of such profits of trade or earnings to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them.

4. The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the Court may think just.

Power to vary orders.

5. If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights; and when any husband who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree *nisi* for the dissolution of the marriage on the grounds of adultery coupled with desertion. Such decree *nisi* shall not be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall fix a shorter time.

Non-compliance with decree deemed to be desertion.

6. The Court may, at any time before final decree on any application for restitution of conjugal rights, or after final decree if the respondent shall fail to comply therewith, upon application for that purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and respondent as might have been made by interim orders during the pendency of a trial for judicial separation between the same parties.

Custody, &c. of children.

7. This Act shall not extend to Scotland or Ireland.

Act to apply to England only.

MARRIED WOMEN'S PROPERTY ACT, 1893.

56 & 57 VICT. c. 63.

An Act to amend the Married Women's Property Act, 1882.

[5th December, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Effect of
contracts by
married
women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

- (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract ;
- (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to ; and
- (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to ;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

Costs may be
ordered to be
paid out of
property
subject to
restraint on
anticipation.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

Will of mar-
ried woman.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

5. This Act may be cited as the Married Women's Property Act, Short title. 1893.

6. This Act shall not apply to Scotland.

Extent.



SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895.

58 & 59 VICT. c. 39.

An Act to amend the Law relating to the Summary Jurisdiction of Magistrates in reference to Married Women.

[6th July, 1895.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited for all purposes as the Summary Short title. Jurisdiction (Married Women) Act, 1895.

2. This Act shall not extend to Scotland or Ireland.

Application
of Act.

3. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-six.

Commence-
ment of Act.

4. Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section forty-three of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately

By and to
whom orders
may be ap-
plied for.
24 & 25 Vict.
c. 100.

and apart from him, may apply to any Court of Summary Jurisdiction acting within the city, borough, petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act: Provided that where a married woman is entitled to apply for an order or orders under this section on the ground of the conviction of her husband upon indictment, she may apply to the Court before whom her husband has been convicted, and that Court shall, for the purposes of this section, become a Court of Summary Jurisdiction, and shall have the power without a jury to hear an application, and make the order or orders applied for.

Powers of Court.

5. The Court of Summary Jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz. :—

- (a) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty) :
- (b) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant :
- (c) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the Court or third person on her behalf, such weekly sum not exceeding two pounds as the Court shall, having regard to the means both of the husband and wife, consider reasonable :
- (d) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit.

Limitations of powers of Court.

6. No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery.

Court may vary or discharge order.

7. A Court of Summary Jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto,

or either of them, has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds. If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged.

8. All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts, and, in the case of a conviction of a husband for aggravated assault upon his wife, her application may, by leave of the Court, be made by summons to be issued and made returnable immediately upon such conviction. Procedure.

9. The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation. Enforcement of orders for payment of money.

10. If in the opinion of a Court of Summary Jurisdiction the matters in question between the parties or any of them would be more conveniently dealt with by the High Court, the Court of Summary Jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the Court of Summary Jurisdiction : Provided always, that the High Court or a judge thereof shall have power by order in any proceeding in the High Court relating to or comprising the same subject-matter as the application so refused as aforesaid, or any part thereof, to direct the Court of Summary Jurisdiction to rehear and determine the same. Court may refuse an order in cases more fit for the High Court.

11. Save as is herein-before provided, an appeal shall lie from any order or the refusal of any order by a Court of Summary Jurisdiction under this Act to the Probate, Divorce, and Admiralty Division of the High Court of Justice. Rules of Court may from time to time be made regulating the practice and procedure in such appeals. And, until altered or repealed, any rules already made as to appeals under section four of the Matrimonial Causes Act, 1878, shall apply to appeals under this Act. Appeal.

Repeal of
Acts.

12. The Acts specified in the schedule to this Act are hereby repealed to the extent therein mentioned, except so far as they apply to Ireland.

SCHEDULE.

ENACTMENTS REPEALED.

Year and Chapter.	Title or Short Title.	Extent of Repeal.
41 & 42 Vict. c. 19 -	Matrimonial Causes Act, 1878.	Section four.
49 & 50 Vict. c. 52 -	Married Women (Maintenance in Case of Desertion) Act, 1886.	The whole Act.

RULES AND REGULATIONS

MADE UNDER THE PROVISIONS OF

20 & 21 Vict. c. 85.	32 & 33 Vict. c. 62.
23 & 24 Vict. c. 144.	38 & 39 Vict. c. 77.

RULES AND REGULATIONS, 26TH DECEMBER, 1865 (a).

[Rules 18, 59 and 83, which relate to "Forms," are omitted.]

All rules and regulations heretofore made and issued for Her Majesty's Court for Divorce and Matrimonial Causes shall be revoked on and after the 11th day of January, 1866, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules and regulations shall take effect in Her Majesty's Court for Divorce and Matrimonial Causes on and after the 11th day of January, 1866.

Petition.

1. Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition.

2. Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal

(a) For a comprehensive list of Forms in use in the Probate and Divorce Division of the High Court, see Brown and Powles on Divorce, 7th ed.

cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavits shall be filed with the petition.

See also Rule 175.

3. In cases where the petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage.

Co-respondents.

4. Upon a husband filing a petition for dissolution of marriage on the ground of adultery the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct.

5. Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit.

6. If the names of the alleged adulterers or either of them should be unknown to the petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the registrars to amend the petition by inserting such name therein, and the registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition.

7. The term "respondent" where the same is hereinafter used shall include all co-respondents so far as the same is applicable to them.

Citation.

8. Every petitioner who files a petition and affidavit shall forthwith extract a citation, under seal of the Court, for service on each respondent in the cause.

9. Every citation shall be written or printed on parchment, and the party extracting the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there deposit the præcipe and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post Office.

Service.

10. Citations are to be served personally when that can be done.

11. Service of a citation shall be effected by personally delivering a true copy of the citation to the party cited, and producing the original, if required.

12. To every person served with a citation shall be delivered, together with the copy of the citation, a certified copy of the petition, under seal of the Court.

13. In cases where personal service cannot be effected, application may be made by motion to the Judge Ordinary, or to the registrars in his absence, to substitute some other mode of service.

14. After service has been effected, the citation, with a certificate of service endorsed thereon, shall be forthwith returned into and filed in the registry.

15. When it is ordered that a citation shall be advertised, the newspapers containing the advertisements are to be filed in the registry with the citation.

16. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

17. Before a petitioner can proceed, after having extracted a citation, an appearance must have been entered by or on behalf of the respondents, or it must be shown by affidavit, filed in the registry, that they have been duly cited, and have not appeared.

Appearance.

19. All appearances to citations are to be entered in the registry in a book provided for that purpose.

20. An appearance may be entered at any time before a proceeding has been taken in default, or afterwards, as hereinafter directed, or by leave of the Judge Ordinary, or of the registrars in his absence, to be applied for by motion founded on affidavit.

See also Rule 185.

21. Every entry of an appearance shall be accompanied by an address, within three miles of the General Post Office.

22. If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the registry his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

See Rules from 56 to 61 as to proceedings on act on petition.

Interveners.

23. Application for leave to intervene in any cause must be made to the Judge Ordinary by motion, supported by affidavit.

24. Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the Judge Ordinary.

Suits in formd Pauperis.

25. Any person desirous of prosecuting a suit *in formd pauperis* is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

26. No person shall be admitted to prosecute a suit *in formd pauperis* without the order of the Judge Ordinary; and to obtain such order the case laid before counsel and his opinion thereon, with an affidavit of the party or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit of the party applying as to his or her income or means of living, and that he or she is not worth 25*l.*, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

See also Rules 208 to 211.

27. Where a husband admitted to sue as a pauper neglects to proceed in a cause, he may be called upon by summons to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

Answer.

28. Each respondent who has entered an appearance may within twenty-one days after service of citation on him or her file in the registry an answer to the petition.

See also Rule 186.

29. Each respondent shall on the day he or she files an answer, deliver a copy thereof to the petitioner, or to his or her proctor, solicitor, or attorney.

30. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the respondent, verifying such other or additional matter, so far as he or she has personal cognizance thereof and deposing as to his or her belief in the truth of the rest of such other or additional matter, and such affidavit shall be filed with the answer.

31. In cases involving a decree of nullity of marriage or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the respondent who is husband or

wife of the petitioner shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the deponent and the petitioner.

Further Pleadings.

32. Within fourteen days from the filing and delivery of the answer the petitioner may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder, or any subsequent pleading.

33. A copy of every reply and subsequent pleading shall on the day the same is filed be delivered to the opposite parties, or to their proctor, solicitor, or attorney.

General Rules as to Pleadings.

34. Either party desiring to alter or amend any pleading must apply by motion to the Court for permission to do so, unless the alteration or amendment be merely verbal, or in the nature of a clerical error, in which case it may be made by order of the Judge Ordinary, or of one of the registrars in his absence, obtained on summons.

See also Rules 181 to 184 and Rule 187.

35. When a petition, answer, or other pleading has been ordered to be altered or amended, the time for filing and delivering a copy of the next pleading shall be reckoned from the time of the order having been complied with.

36. A copy of every pleading showing the alterations and amendments made therein shall be delivered to the opposite parties on the day such alterations and amendments are made in the pleadings filed in the registry; and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose.

37. If either party in the cause fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same, or to deliver a copy of any altered or amended pleading, within the time allowed for the purpose, the party to whom the copy of such answer, reply, or other pleading, or altered or amended pleading, ought to have been delivered, shall not be bound to receive it, and such answer, reply, or other pleading shall not be filed, or be treated or considered as having been filed, or be altered or amended, unless by order of the Judge Ordinary, or of one of the registrars, to be obtained on summons. The expense of obtaining such order shall fall on the party applying for it, unless the Judge Ordinary or registrar shall otherwise direct.

38. Applications for further particulars of matters pleaded are to be made to the Judge Ordinary, or to one of the registrars in his absence, by summons, and not by motion.

See also Rules 181 to 184.

Service of Pleadings, &c.

39. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and regulations, at the respective addresses furnished by or on behalf of the several parties to the cause.

See also Rule 114.

Mode of Trial.

40. When the pleadings on being concluded have raised any questions of fact, the petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that time, on the next day appointed for hearing motions in this Court, or in case the petitioner should fail to do so at such time, either of the respondents on whose behalf such questions have been raised, may apply to the Judge Ordinary by motion to direct the truth of such questions of fact to be tried by a special or common jury.

See also Rule 205.

Questions of Fact for the Jury.

41. Whenever the Judge Ordinary directs the issues of fact in a cause to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the petitioner, and settled by one of the registrars.

42. Should the petitioner fail to prepare and deposit the questions for settlement in the registry within fourteen days after the Judge Ordinary has directed the mode of trial, either of the respondents on whose behalf such questions have been raised shall be at liberty to do so.

43. After the questions have been settled by the registrar, the party who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause, and either of such parties shall be at liberty to apply to the Judge Ordinary, by summons within eight days, or at the expiration of that time on the next day appointed for hearing summonses in this Court, to alter or amend the same, and his decision shall be final.

Setting down the Cause for Trial or Hearing.

44. In cases to be tried by a jury, the petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment

of the same, in pursuance of the order of the Judge Ordinary, shall file such questions as finally settled in the registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered.

See also Rule 206.

45. In cases to be heard without a jury, the petitioner shall, after obtaining directions as to the mode of hearing, set the cause down for hearing, and on the same day give notice of his having done so to each party in the cause for whom an appearance has been entered.

See also Rules 205 and 206.

46. If the petitioner fail to file the questions for the jury, or to set down the cause for trial or hearing, or to give due notice thereof, for the space of one month, after directions have been given as to the mode in which the cause shall be tried or heard, either of the respondents entitled to be heard at such trial or hearing may file the questions for the jury, and set the cause down for trial or hearing, and shall on the same day give notice of his having done so to the petitioner, and to each of the other parties to the cause for whom an appearance has been entered.

47. A copy of every notice of the cause being set down for trial or hearing shall be filed in the registry, and the cause shall come on in its turn, unless the Judge Ordinary shall otherwise direct.

Trial or Hearing.

48. No cause shall be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the consent of all parties to the suit.

49. The registrar shall enter in the Court book the finding of the jury and the decree of the Court, and shall sign the same.

50. Either of the respondents in the cause, after entering an appearance, without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a respondent, who is husband or wife of the petitioner, may be heard also in respect to any question as to custody of children, but a respondent who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause.

Evidence taken by Affidavit.

51. When the Judge Ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits, such

affidavits shall be filed in the registry within eight days from the time when such direction was given, unless the Judge Ordinary shall otherwise direct.

See also Rule 188.

52. Counter-affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer.

53. Copies of all such affidavits and counter-affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their proctors, solicitors, or attorneys.

54. Affidavits in reply to such counter-affidavits cannot be filed without permission of the Judge Ordinary or of the registrars in his absence.

55. Application for an order for the attendance of a deponent for the purpose of being cross-examined in open Court shall be made to the Judge Ordinary, on summons.

Proceedings by Petition.

56. Any party to a cause who has entered an appearance may apply on summons to the Judge Ordinary, or in his absence to the registrars, to be heard on his petition touching any collateral question which may arise in a suit.

57. The party to whom leave has been given to be heard on his petition shall within eight days file his act on petition in the registry, and on the same day deliver a copy thereof to such parties in the cause as are required to answer thereto.

58. Each party to whom a copy of an act on petition is delivered shall within eight days after receiving the same file his or her answer thereto in the registry, and on the same day deliver a copy thereof to the opposite party, and the same course shall be pursued with respect to the reply, rejoinder, &c., until the act on petition is concluded.

60. Each party to the act on petition shall within eight days from that on which the last statement in answer is filed, file in the registry such affidavits and other proofs as may be necessary in support of their several averments.

61. After the time for filing affidavits and proofs has expired, the party filing the act on petition is to set down the petition for hearing in the same manner as a cause; and in the event of his failing to do so within a month any party who has filed an answer thereto may set the same down for hearing, and the petition will be heard in its turn with other causes to be heard by the Judge Ordinary without a jury.

New Trial and Hearing.

62. An application to the Judge Ordinary for a new trial of issues of fact tried by a jury, or for a re-hearing of a cause, may be made by motion within fourteen days from the day on which the issues were tried or the cause was heard, if the Judge Ordinary be then sitting to hear motions, if not, on the first day appointed for hearing motions in this Court after the expiration of the fourteen days.

Petition for Reversal of Decree of Judicial Separation.

63. A petition to the Court for the reversal of a decree of judicial separation must set out the grounds on which the petitioner relies.

64. Before such a petition can be filed, an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the cause in which the decree has been pronounced.

65. A certified copy of such a petition, under seal of the Court, shall be delivered personally to the party in the cause in whose favour the decree has been made, who may within fourteen days file an answer thereto in the registry, and shall on the day on which the answer is filed deliver a copy thereof to the other party in the cause, or to his or her proctor, solicitor, or attorney.

66. All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original petition for judicial separation, and answer thereto, so far as such directions are applicable.

Demurrer.

67. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the Judge Ordinary without a jury, unless the Judge Ordinary shall direct otherwise.

Intervention of the Queen's Proctor.

68. The Queen's Proctor shall, within fourteen days after he has obtained leave to intervene in any cause, enter an appearance and plead to the petition; and on the day he files his plea in the registry shall deliver a copy thereof to the petitioner, or to his proctor, solicitor, or attorney.

69. All subsequent pleadings and proceedings in respect to the Queen's Proctor's intervention in a cause shall be filed and carried on in the same manner as before directed in respect of the pleadings and proceedings of the original parties to the cause.

See also Rule 202.

Showing Cause against a Decree.

70. Any person wishing to show cause against making absolute a decree *nisi* for dissolution of a marriage shall enter an appearance in the cause in which such decree *nisi* has been pronounced.

71. Every such person shall at the time of entering an appearance, or within four days thereafter, file affidavits setting forth the facts upon which he relies.

72. Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in whose favour the decree *nisi* has been pronounced.

73. The party in the cause in whose favour the decree *nisi* has been pronounced may, within eight days after delivery of the affidavits, file affidavits in answer, and shall, upon the day such affidavits are filed, deliver a copy thereof to the person showing cause against the decree being made absolute.

74. The person showing cause against the decree *nisi* being made absolute may within eight days file affidavits in reply, and shall upon the same day deliver copies thereof to the party supporting the decree *nisi*.

75. No affidavits are to be filed in rejoinder to the affidavits in reply without permission of the Judge Ordinary or of one of the registrars in his absence.

76. The questions raised on such affidavits shall be argued in such manner and at such time as the Judge Ordinary may on application by motion direct; and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court.

Rules 70 to 76 not applicable to the Queen's Proctor. *See Rule 202.*

Appeals to the full Court.

77. An appeal to the full Court from a decision of the Judge Ordinary must be asserted in writing and the instrument of appeal filed in the registry within the time allowed by law for appealing from such decision; and on the same day on which the appeal is filed, notice thereof, and a copy of the appeal, shall be delivered to each respondent in the appeal, or to his or her proctor, solicitor, or attorney.

78. The appellant within ten days after filing his instrument of appeal, or within such further time as may be allowed by the Judge Ordinary, or by the registrars in his absence, shall file in the registry his case in support of the appeal in triplicate, and on the same day deliver a copy thereof to each respondent in the appeal, or to his proctor, solicitor, or attorney, who, within ten days from the time of such filing and delivery or from such further time as may be allowed for the purpose by the Judge Ordinary, or the registrars in his absence, shall be at liberty to file in the registry a case against the appeal, also in triplicate, and the respondent shall on the same day deliver a copy thereof to the appellant, or to his proctor, solicitor, or attorney.

79. After the expiration of ten days from the time when the respondent has filed his case, or, if he has filed none, from the time allowed him for the purpose, the appeal shall stand for hearing at the next sittings of the full Court, and will be called on in its turn, unless otherwise directed.

Decree absolute.

80. All applications to make absolute a decree *nisi* for dissolution of a marriage must be made to the Court by motion. In support of such applications it must be shown by affidavit filed with the case for motion that search has been made in the proper books at the registry up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person, it must be shown by affidavit what proceedings, if any, had been taken thereon, but it shall not be necessary to file a copy of the decree *nisi*.

See also Rules 194 and 207.

Alimony.

81. The wife, being the petitioner in a cause, may file her petition for alimony pending suit at any time after the citation has been duly served on the husband, or after order made by the Judge Ordinary to dispense with such service, provided the factum of marriage between the parties is established by affidavit previously filed.

82. The wife, being the respondent in a cause, after having entered an appearance, may also file her petition for alimony pending suit.

84. The husband shall, within eight days after the filing and delivery of a petition for alimony, file his answer thereto upon oath.

85. The husband, being respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony.

86. The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge Ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon.

See also Rule 189.

87. In case the answer of the husband alleges that the wife has property of her own, she may (within eight days) file a reply on oath to that allegation; but the husband is not at liberty to file a rejoinder to such reply without permission of the Judge Ordinary, or of one of the registrars in his absence.

88. A copy of every petition for alimony, answer and reply, must be delivered to the opposite party, or to his or her proctor, solicitor, or attorney, on the day the same is filed.

89. After the husband has filed his answer to the petition for alimony (subject to any order as to costs), or, if no answer is filed, at the expiration of the time allowed for filing an answer, the wife may proceed to examine witnesses in support of her petition, and apply by motion for an allotment of alimony pending suit, notice of the motion, and of the intention to examine witnesses, being given to the husband, or to his proctor, solicitor, or attorney, four days previously to the motion being heard and the witnesses examined, unless the Judge Ordinary shall dispense with such notice.

See also Rules 191 and 192.

90. No affidavits can be read or made use of as evidence in support of or in opposition to the averments contained in a petition for alimony, or in an answer to such a petition, or in a reply, except such as may be required by the Judge Ordinary or by one of the registrars.

91. A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full Court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the Judge Ordinary by motion for an allotment of permanent alimony; provided that she shall, eight days at least before making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney.

See also Rule 190.

92. A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted by reason of the increased faculties of the husband, or the husband may file a petition for a diminution of the alimony allotted by reason of reduced faculties; and the course of proceeding in such cases shall be the same as required by these rules and regulations in respect of the original petition for alimony, and the allotment thereof, so far as the same are applicable.

93. Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final decree of the Judge Ordinary, or of the full Court on appeal, as the case may be.

94. Alimony pending suit, and also permanent alimony, shall be paid to the wife, or to some person or persons to be nominated in writing by her, and approved of by the Court, as trustee or trustees on her behalf.

Maintenance and Settlements.

95. Applications to the Court to exercise the authority given by sections 32 and 45 of 20 & 21 Vict. c. 85, and by section 5 of the 22 & 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter.

96. In cases of application for maintenance under section 32 of the 20 & 21 Vict. c. 85, such petition may be filed as soon as a decree *nisi* has been pronounced, but not before.

97. A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be), and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the Judge Ordinary on motion shall direct any other mode of service, or dispense with service of the same on them or either of them.

98. The husband or wife (as the case may be), and the other person or persons (if any) who are served with such petition, within fourteen days after service, may file his, her, or their answer on oath to the said petition, and shall on the same day deliver a copy thereof to the opposite party, or to his proctor, solicitor, or attorney.

99. Any person served with the petition, not being a party to the principal cause, must enter an appearance before he or she can file an answer thereto.

100. Within fourteen days from the filing the answer, the opposite party may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder.

101. Such pleadings, when completed, shall in the first instance be referred to one of the registrars, who shall investigate the averments therein contained, in the presence of the parties, their proctors, solicitors, or attorneys, and who for that purpose shall be at liberty to require the production of any documents referred to in such pleadings, or to call for any affidavits, and shall report in writing to the Court the result of his investigation, and any special circumstances to be taken into consideration with reference to the prayer of the petition.

See also Rule 204.

102. The report of the registrar shall be filed in the registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the registrar; and either of the parties, within fourteen days after such notice has been given, if the Judge Ordinary be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the Judge Ordinary on motion in objection to the registrar's report, or may apply on motion for a decree or order to confirm the same, and to carry out the prayer of the petition.

103. The costs of a wife of and arising from the said petition or answer shall not be allowed on taxation of costs against the husband before the final decree in the principal cause, without direction of the Judge Ordinary.

Custody of and Access to Children.

104. Before the trial or hearing of a cause a husband or wife who are parties to it may apply for an order with respect to the custody, maintenance, or education of or for access to children, issue of their marriage, to the Judge Ordinary, by motion founded on affidavit.

See also Rule 212.

Guardians to Minors.

105. A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends, as guardian, for the purpose of proceeding on his or her behalf as petitioner, respondent, or intervener in a cause.

106. The necessary instrument of election must be filed in the registry before the guardian elected can be permitted to extract a citation or to enter an appearance on behalf of the minor.

107. When a minor shall elect some person or persons other than his or her next of kin, as guardian for the purposes of a suit, or when an infant (under the age of seven years) becomes a party to a suit, application, founded on affidavit, is to be made to one of the registrars, who will assign a guardian to the minor or infant for such suit.

108. It shall not be necessary for a minor who, as an alleged adulterer, is made a co-respondent in a suit, to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence.

Subpœnas.

109. Every subpoena shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and there deposit the præcipe.

See also Rule 180.

Writs of Attachment and other Writs.

110. Applications for writs of attachment, and also for writs of *feri facias* and of sequestration, must be made to the Judge Ordinary by motion in Court.

See also Rules 179 and 203.

111. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved and signed by one of the registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the Judge Ordinary or for other judges of the Court to sign such writs.

112. Any person in custody under a writ of attachment may apply for his or her discharge to the Judge Ordinary if the Court be then sitting; if not, then to one of the registrars, who for good cause shown shall have power to order such discharge.

Notices.

113. All notices required by these rules and regulations, or by the practice of the Court shall be in writing, and signed by the party, or by his or her proctor, solicitor, or attorney.

Service of Notices, &c.

114. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by these rules and regulations are required to be given or delivered to the opposite parties in the

cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required at the address furnished as aforesaid by the petitioner and respondent respectively.

See also Rule 39.

115. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the Judge Ordinary.

116. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the Judge Ordinary shall otherwise direct.

117. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the commissioner or other person before whom the affidavit is sworn.

Office Copies, Extracts, &c.

118. The registrars of the principal registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for Divorce and Matrimonial Causes; and all rules and orders, and fees payable in respect of searches for and inspection or copies of and extracts from and attendance with books and documents in the registry of the Court of Probate, shall extend to such pleadings and other documents brought in or filed, and all entries of orders and decrees made in the Court for Divorce and Matrimonial Causes, save that the length of copies and extracts shall in all cases be computed at the rate of seventy-two words per folio.

119. Office copies or extracts furnished from the registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the principal registrars of the Court of Probate to be an examined copy.

120. The seal of the Court will not be affixed to any copy which is not certified to be an examined copy.

Time fixed by these Rules.

121. The Judge Ordinary shall in every case in which a time is fixed by these rules and regulations for the performance of any act, or for any proceeding in default, have power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit.

122. To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the Judge Ordinary for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the Judge Ordinary shall next sit in chambers.

See also Rules 181 to 184.

123. The time fixed by these rules and regulations for the performance of any act, or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Protection Orders.

124. Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made in writing to the Judge Ordinary in chambers, and supported by affidavit.

See also Rule 197.

125. Applications for the discharge of any order made to protect the earnings and property of a wife are to be made to the Judge Ordinary by motion, and supported by affidavit. Notice of such motion, and copies of any affidavit or other document to be read or used in support thereof, must be personally served on the wife eight clear days before the motion is heard.

Bond not required.

126. On a decree of judicial separation being pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

Change of Proctor, Solicitor, or Attorney.

127. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the Judge Ordinary, or to the registrars in his absence.

See also Rules 181 to 184.

128. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction and by order of the Judge Ordinary or of the registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs.

Order for the Immediate Examination of a Witness.

129. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the Judge Ordinary, or to the registrars in his absence, by summons, or if on behalf of a petitioner proceeding in default of appearance of the parties cited in the cause without summons before one of the registrars, who will direct the order to issue, or refer the application to the Judge Ordinary, as he may think fit.

See also Rules 181 to 184.

130. Such witness shall be examined *vidæ voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the Judge Ordinary or by the registrars to whom the application for the order is made.

131. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the Judge Ordinary or the registrars to whom the application is made for the order shall direct a shorter notice to be given.

Commissions and Requisitions for Examination of Witnesses.

132. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a petitioner proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the Judge Ordinary, as he may think fit.

133. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by the registrar, or for want of agreement to be nominated by the registrar to whom the application is made.

134. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by

summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the Judge Ordinary.

135. Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the Judge Ordinary.

136. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars.

137. In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply by summons to one of the registrars to ascertain and report to the Court what is a sufficient sum of money to be paid or secured to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the registry, unless the Judge Ordinary or one of the registrars in his absence shall otherwise direct.

See also Rule 198.

Affidavits.

138. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.

139. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

140. No affidavit will be admitted in any matter depending in the Court for Divorce and Matrimonial Causes in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the registrar, commissioner, or other authority before whom it was sworn.

141. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read

in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature thereto, in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.

142. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a partner or clerk of his or her proctor, solicitor, or attorney.

143. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules and regulations in respect of taking affidavits which are applicable to those in whose stead they are acting.

144. No affidavit can be read or used unless the proper stamps to denote the fees payable on filing the same are delivered with such affidavit.

145. Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge Ordinary.

146. The above rules and regulations in respect to affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations to be read or used in the Court for Divorce and Matrimonial Causes.

Cases for Motion.

147. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded.

148. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars.

149. On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the Judge Ordinary.

150. Copies of any affidavit or documents to be read or used in support of a motion are to be delivered to the opposite parties to the suit who are entitled to be heard in opposition thereto.

Taxing Bills of Costs.

151. All bills of costs are referred to the registrars of the principal registry of the Court of Probate for taxation, and may be taxed by them, without any special order for that purpose. Such bills are to be filed in the registry.

See also Rule 177.

152. Notice of the time appointed for taxation will be forwarded to the party filing the bill, at the address furnished by such party.

153. The party who has obtained an appointment to tax a bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

154. When an appointment has been made by a registrar of the Court of Probate for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

155. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application as against his client, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner.

156. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

See also Rule 200.

157. If an order for payment of costs is required, the same may be obtained by summons, on the amount of such costs being certified by the registrar.

See also Rules 178, 179 and 201.

Wife's Costs.—As amended 14th July, 1875.

158. After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause by order of the Judge Ordinary, or of the registrars, to be obtained on summons, a wife who is petitioner, or has entered an appearance as respondent in a cause, may file her bill or bills of costs for taxation as against her husband, and the registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial have been given, ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar; provided that in case the husband should by reason of his wife having separate property, or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability.

159. When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial.

See also Rule 201.

Summonses.

160. A summons may be taken out by any person in any matter or suit depending in the Court for Divorce and Matrimonial Causes, provided there is no rule or practice requiring a different mode of proceeding.

161. The name of the cause or matter, and of the agent taking out the summons, is to be entered in the summons book, and a true copy of the summons is to be served on the party summoned one clear day at least before the summons is returnable, and before 7 o'clock p.m. On Saturdays the copy of the summons is to be served before 2 o'clock p.m.

162. On the day and at the hour named in the summons the party taking out the same is to present himself with the original

summons at the judge's chambers, or elsewhere appointed for hearing the same.

163. Both parties will be heard by the Judge Ordinary, who will make such order as he may think fit, and a minute of such order will be made by one of the registrars in the summons book.

See also Rules 181 to 184.

164. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the Judge Ordinary, who will thereupon make such order as he may think fit.

165. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge Ordinary on that occasion.

166. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the party summoned, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy.

167. If a summons is brought to the registry, with consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the Judge Ordinary; provided that the order sought is in the opinion of the registrar one which, under the circumstances, would be made by the Judge Ordinary.

168. The same rules and regulations shall, so far as applicable, be observed in respect to summonses which may be heard and disposed of by the registrars.

Payment of Money out of Court.

169. Persons applying for payment of money out of Court are to bring into the registry a notice in writing setting forth the day on which the money applied for was paid into the registry, the minute entered in the Court books on receiving the same, the date and particulars of the order for payment to the applicant. In case the money applied for be in payment of costs, the notice must also set forth the date of filing the bill for taxation, and of the registrar's certificate.

170. The above notice must be deposited in the registry two clear days at least before the money is paid out, and is, in that interval, to be examined by one of the clerks of the registry with the original entries in the Court books, and the bills of costs referred to in it, and certified by such clerk to be correct.

171. When the Court is not sitting, payment of money out of Court will be made only on such day or days of the week as may be fixed by the registrars, notice whereof will be given in the registry.

Registries and Officers.

172. The registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the registrars of the principal registry of the Court of Probate.

173. The record keepers, the sealer, and other officers of the principal registry of the Court of Probate, shall discharge the same or similar duties in the Court for Divorce and Matrimonial Causes, and in the registry thereof, as they discharge in the Court of Probate and the principal registry thereof.

Proceedings under "the Legitimacy Declaration Act, 1858."

174. The above rules and regulations, so far as the same may be applicable, shall extend to applications and proceedings under "the Legitimacy Declaration Act, 1858."

ADDITIONAL RULES.—30TH JANUARY, 1869.

Restitution of Conjugal Rights.

175. The affidavit filed with the petition, as required by Rule 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld.

176. At any time after the commencement of proceedings for restitution of conjugal rights the respondent may apply by summons to the Judge, or to the registrars in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the petitioner.

As to Costs.

177. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation, shall not take place before the time allowed for moving for a new trial or re-hearing

shall have expired; or, in case a rule *nisi* should have been granted, until the rule is disposed of, unless the Judge Ordinary shall, for cause shown, direct a more speedy taxation.

178. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days.

See also Rules from 151 to 158, and 201.

179. This order shall be served on the proctor, solicitor, or attorney of the party liable [or if it is desired to enforce the order by attachment on the party himself], and if the costs be not paid within the seven days a writ of *feri facias* or writ of sequestration shall be issued as of course in the registry, upon an affidavit of service of the order and non-payment.

See also Rules 110, 111, and 203.

As to Subpœnas.

180. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness.

DEBTORS ACT, 1869.

ADDITIONAL RULE.—15TH FEBRUARY, 1870.

180A. In pursuance of "the Debtors Act, 1869," it is ordered that, on and after this date, the following rules shall be in force for regulating the practice under and carrying into effect the first part of the said "Debtors Act, 1869."

1. All applications to commit to prison under section 5 shall, in the first instance, be made by summons before the Judge Ordinary, which shall specify the date and other particulars of the order for non-payment of which the application is made, together with the amount due, and be endorsed with the name and place of abode or office of business of the proctor or attorney actually suing out the summons, and in case such attorney shall not be an attorney of this Court, then also with the name and place of abode or office of business of the attorney in whose name such summons shall be taken out, and when the attorney actually suing out such summons shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be endorsed upon the said summons, and in case no attorney shall be employed to issue the summons then it shall be endorsed with a memorandum expressing that the same has been sued out by the petitioner or respondent or co-respondent in person, as the case

may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such petitioner's, respondent's or co-respondent's residence, if any such there be.

2. The service of the summons, whenever it may be practicable, shall be personal; but if it appear to the Judge Ordinary that reasonable efforts have been made to effect personal service, and either that the summons has come to the knowledge of the debtor, or that he wilfully evades service, an order may be made as if personal service had been effected upon such terms as to the Judge Ordinary may seem fit.

3. Proof of the means of the debtor shall, whenever practicable, be given by affidavit; but if it appear to the Judge Ordinary either before or at the hearing that a *vidæ voce* examination, either of the debtor or of any other person, or the production of any document, is necessary or expedient, an order may be made commanding the attendance of any such person before the Judge Ordinary at a time and place to be therein mentioned for the purpose of being examined on oath touching the matter in question (or and) for the production of any such document, subject to such terms and conditions as to the Judge Ordinary may seem fit. The disobedience to any such order shall be deemed a contempt of Court, and punishable accordingly.

4. The order of committal shall before delivery to the sheriff be endorsed with the particulars required by Rule 1 of these rules. Concurrent orders may be issued for execution in different counties. The sheriff shall be entitled to the same fees in respect thereof as are now payable upon a *ca. sa.*

5. Upon payment of the sum or sums mentioned in the order (including the sheriff's fees in like manner as upon a *ca. sa.*) the debtor shall be entitled to a certificate signed by the proctor or attorney in the cause, of the petitioner, respondent, or co-respondent, as the case may be, or signed by the petitioner, respondent, or co-respondent, as the case may be, and attested by an attorney or justice of the peace.

6. The sheriff or other officer named in an order of committal shall within two days after the arrest endorse on the order the true date of such arrest.

ADDITIONAL AND AMENDED RULES.—23RD FEBRUARY, 1875.

181. All summonses heretofore heard by the registrars of the principal registry of the Court of Probate in the absence of the Judge Ordinary shall hereafter be heard before one or more of the

registrars at the principal registry of that Court during the period appointed for the sittings of the Court at Westminster, as well as in the judge's absence.

182. All rules and regulations in respect to summonses now heard before the Judge Ordinary in chambers at Westminster shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the registrars at the principal registry.

See Rules from 160 to 168.

183. The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the Judge Ordinary.

184. Any person heard on the summons objecting to the order so issued under the direction of the registrars may, subject to any order as to costs, apply to the Judge Ordinary on summons to rescind or vary the same.

ADDITIONAL RULES.—14TH JULY, 1875.

Appearance.

185. Application for leave to enter an appearance after a proceeding has been taken in default heretofore made to the Judge Ordinary on motion in pursuance of Rule 20 shall hereafter be made by summons before one of the registrars.

See also Rule 20.

Answer.

186. In case the time allowed for entry of appearance to a citation should be more than eight days after service thereof, a respondent who has entered an appearance may, within 14 days from the expiration of the time allowed for the entry of appearance, file in the registry an answer to the petition.

See also Rule 28.

General Rule as to Pleadings.

187. Either of the parties before the Court desiring to alter or amend a pleading may apply by summons to one of the registrars for an order for that purpose.

See also Rule 34.

Evidence taken by Affidavit.

188. In an undefended cause when directions have been given that all or any of the facts set forth in the petition be proved by

affidavits, such affidavits may be filed in the registry at any time up to 10 clear days before the cause is heard.

See also Rule 51.

Alimony.

189. Application for an order for a further and fuller answer to a petition for alimony, heretofore made to the Judge Ordinary on motion in pursuance of Rule 86, shall hereafter be made by summons before one of the registrars.

See Rule 86.

190. A wife who has obtained a final decree of judicial separation, on such decree being affirmed on appeal, or after the expiration of the time for appealing against the decree if no appeal be then pending, may apply to the Court by petition for an allotment of permanent alimony, though no alimony shall have been allotted to her pending suit, and the Rules from 84 to 88, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, relating to petitions for alimony pending suit as varied by these and other additional rules and regulations shall, so far as the same are applicable, be observed in respect to the proceedings upon such petitions for permanent alimony.

See also Rules 84 to 88, and 91 and 92.

191. All applications for an allotment of alimony pending suit, and for an allotment of permanent alimony heretofore made to the Court by motion in pursuance of Rules 89 and 91, shall hereafter be referred to one of the registrars at the principal registry, who shall investigate the averments in the petition for alimony, answer, and reply, in the presence of the parties, their proctors, solicitors, or attorneys, and who, if he think fit, shall be at liberty to require the attendance of the husband for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents or to call for affidavits, and shall direct such order to issue as he shall think fit, or refer the application, or any question arising out of it, to the Judge Ordinary for his decision.

See Rules 89 and 91.

192. Any person heard on the reference as to alimony before one of the registrars, objecting to the order issued under his direction, may (subject to any order as to costs) apply to the Judge Ordinary on summons to rescind or vary the same.

Dismissal of Petition.

193. When an order has been made for the dismissal of a petition on payment of costs, the cause will not be removed from the list of

causes in the Court books without an order of one of the registrars, to obtain which it must be shown to his satisfaction the costs have been paid.

Decree Absolute.

194. In case application by motion to make absolute a decree *nisi* for the dissolution of a marriage should from any cause be deferred beyond six days from the time when the affidavit required by Rule 80 is filed with the case for motion, it must be shown by further affidavit that search has been made in the proper books up to within six clear days of the motion for decree absolute being heard, and that at such time no person had obtained leave to intervene, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of any such person, it must also be shown by such further affidavit what proceedings, if any, have been taken thereon.

See also Rules 80 and 207.

Custody, Maintenance, and Education of Children.

195. Rules from 97 to 102, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, shall, so far as the same are applicable, be observed in respect to applications by petition, after a final decree in a cause for orders and provision with respect to the custody, maintenance, and education of children, the marriage of whose parents was the subject of the decree under the authority given to the Court by 22 & 23 Vict. c. 61, s. 4.

See Rules 97 to 102.

Persons of Unsound Mind.

196. A committee duly appointed of a person found by inquiry to be of unsound mind may take out a citation and prosecute a suit on behalf of such person as a petitioner, or enter an appearance, intervene, or proceed with the defence on behalf of such person as a respondent; but if no committee should have been appointed, application is to be made to one of the registrars, who will assign a guardian to the person of unsound mind, for the purpose of prosecuting, intervening in, or defending the suit on his or her behalf; provided that if the opposite party is already before the Court when the application for the assignment of a guardian is made he or she shall be served with notice by summons of such application.

Protection Orders.

197. In the affidavit in support of an application on the part of a wife deserted by her husband for an order to protect her earnings and property acquired since the commencement of such desertion, the applicant must state whether she has any knowledge of the residence of her husband, and if he is known to be residing within the jurisdiction of the Court, he must be served personally with a summons to show cause why such order should not be made.

See also Rule 124.

Commission and Requisitions for Examination of Witnesses.

198. The registrar to whom a commission or requisition for examination of witnesses is referred for settlement, on application on behalf of the wife, may proceed at once and without summons to ascertain what is a sufficient sum of money to be paid or secured to her to cover her expenses in attending at the examination of such witnesses, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed in such order.

See also Rule 137.

Costs.

199. The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the registry of the Court of Probate, and shall not be delivered out or be sued upon without the order of the Court.

200. If more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on taxation thereof, the party on whose application the bill is taxed shall be at liberty to deduct the costs incurred by him in the taxation from the amount of the bill as taxed, if so much remains due, otherwise the same shall be paid by the practitioner to the person on whose application the bill is taxed.

See also Rule 156.

201. The order for payment of costs of suit in which a respondent or co-respondent has been condemned by a decree *nisi* shall, if applied for before the decree *nisi* is made absolute, direct the payment thereof into the registry of the Court of Probate, and such costs shall not be paid out of the said registry to the party entitled to receive them under the decree *nisi* until the decree absolute has been obtained ; but a wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of Rule 159, obtained an order of the Judge Ordinary that her costs of and incidental to

the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation.

See also Rules 157, 178 and 179.

ADDITIONAL RULES.—17TH APRIL, 1877.

Showing Cause against a Decree Nisi.

202. When the Queen's Proctor desires to show cause against making absolute a decree *nisi* for dissolution or nullity of marriage, he shall enter an appearance in the cause in which such decree *nisi* has been pronounced, and shall within fourteen days after entering appearance file his plea in the registry, setting forth the grounds upon which he desires to show cause as aforesaid, and on the day he files his plea in the registry, shall deliver a copy thereof to the person in whose favour such decree has been pronounced, or to his or her solicitor, and all subsequent pleadings and proceedings in respect to such plea shall be filed and carried on in the same manner as directed by the existing rules and regulations Nos. 68 and 69, in regard to the plea of the Queen's Proctor, filed after obtaining leave to intervene in a cause, and the existing rules and regulations from No. 70 to No. 76, both inclusive, shall no longer be applicable to the Queen's Proctor on his showing cause as aforesaid, save as far as regards any proceedings already commenced in pursuance of the said rules and regulations.

See Rules 68 and 69.

Writs of Fieri Facias and other Writs.

203. In default of payment of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of *feri facias* or writ of sequestration or writ of *elegit* shall be issued as of course in the registry upon an affidavit of service of the order and non-payment.

See also Rules 110, 111, and 179.

Maintenance and Settlements.

204. The registrar to whom pleadings are referred for investigation under Rule 101 shall, if he thinks fit, be at liberty to require the attendance of the husband or wife for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses in the same manner as on a reference for an allotment of alimony.

See Rule 101.

ADDITIONAL AND AMENDED RULES.—JULY, 1880.

Mode of Hearing or Trial.

205. It shall not be necessary in any case to apply to the Court by motion for directions as to the mode of hearing or trial of a cause. When the pleadings are concluded the parties to a cause may proceed in all respects as though upon the day of filing the last pleading a special direction had been given by the Court as to the mode of hearing or trial to the effect following:

1st. In cases in which damages are not claimed that the cause be heard by oral evidence before the Court itself, without a jury.

2nd. In cases in which damages are claimed that the cause be tried before the Court with a common jury.

And any party to a cause may apply by summons for a direction that the cause may be heard or tried otherwise than is hereby provided.

See Rules 40 and 45.

206. Before a cause is set down for hearing or trial the pleadings and proceedings in the cause shall be referred to one of the registrars, who shall certify that the same are correct and in order, and the registrar to whom the same are referred shall cause any irregularity in such pleadings or proceedings to be corrected, or refer any question arising therefrom to the Court for its direction; any party to the cause objecting to such direction of the registrar may (subject to any order as to costs) apply to the Court on summons to rescind or vary the same.

Decree Absolute.

207. Application to make absolute a decree *nisi* for dissolution or nullity of a marriage need not hereafter be made to the Court by motion as directed by Rules 80 and 194, but it shall be a sufficient compliance with the said rules to file in the registry, with the affidavit or affidavits therein required, a notice in writing setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose.

See Rules 80 and 194.

Suits in Formd Pauperis.

208. Applications for leave to prosecute or defend a suit *in formd pauperis* may hereafter be made to one of the registrars, who will make such order thereon as he may see fit or refer the application to the Court.

209. The affidavit required by Rule 26, if application is made by a wife to prosecute a suit against her husband *in formd pauperis*, shall state to the best of her knowledge and belief the amount of income or means of living of her husband.

See also Rules 25 and 26.

210. When a husband has been admitted to prosecute a suit against his wife *in formd pauperis*, the wife may apply for an order that she be at liberty to proceed with her defence *in formd pauperis* on production of an affidavit that she has no separate property exceeding 25*l.* in value after payment of her just debts.

211. When a wife has been permitted to prosecute a suit against her husband *in formd pauperis*, the husband may apply for leave to proceed with his defence *in formd pauperis* on production of an affidavit as to his income or means of living, and showing that besides his wearing apparel he is not worth 25*l.* after payment of his just debts.

Access to Children.

212. Application on behalf of a husband or wife, parties to a cause, for access to the children of their marriage may hereafter be made by summons before one of the registrars, who shall direct such order to issue as he thinks fit, subject to appeal to the Court by either party dissatisfied with the order as authorised by Rule 184.

See also Rules 104 and 184.

The Greek Marriages Act, 1884.

213. In pursuance of the provisions of the Act of Parliament 47 & 48 Vict. c. 20, s. 1, whereby it was enacted that any petition to the Probate and Matrimonial Division of Her Majesty's High Court of Justice under the said Act should be accompanied by such affidavit verifying the same as the said Court might from time to time direct:

Now, I, the Right Honourable Sir James Hannen, knight, the President of the said Division, do hereby direct that the affidavit verifying a petition under the said Act shall be in the form and to the effect required by Rule 2 of the rules and regulations for Her Majesty's Court for Divorce and Matrimonial Causes, bearing date 26th December, 1865.

(Signed) JAMES HANNEN.

Dated 6th August, 1884.

Maintenance and Settlements.

214. All applications to the Court to exercise the authority given by sections 2, 3, and 6 of 47 & 48 Vict. c. 68, are to be made by petition, which may be filed, as soon as by the said statutes such applications can be made, or at any time after (not before the

decree is made or before the time has expired for compliance with such decree).

215. Rules 97 to 102, both inclusive, and 195 and 204, shall, so far as the same are applicable, be observed in respect to applications by petition to exercise the authority given by the aforesaid sections 2, 3, and 6 of 47 & 48 Vict. c. 68.

216. In divorce and matrimonial causes solicitors shall be entitled to charge, and be allowed the fees set forth in the column headed "Lower Scale" in Appendix N.,* annexed to the Rules of the Supreme Court, 1883, so far as the same are applicable to such causes.

217. The fees set forth in the column headed "Higher Scale" in the said Appendix N., so far as the same are applicable, may be allowed either generally in any divorce or matrimonial cause, or as to the costs of any particular application made or business done therein if on special grounds arising out of the nature or importance or the difficulty or urgency of the case, the Court, or a judge, shall at the trial or hearing or further consideration of such a cause, or at the hearing of any application therein, whether the cause shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order, or if the taxing registrar, under directions given to him for that purpose by the Court or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid.

218. Upon any reference to the taxing registrar to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof, if such bill shall include charges for business done in any divorce or matrimonial cause, the taxing registrar may allow the fees set forth in the column "Higher Scale" in the said Appendix N., so far as the same are applicable in respect of such cause, or in respect of any particular application made or business done therein, if, on such special grounds as in the last preceding rule mentioned, he shall think that such allowance ought to be so made.

(Signed)

HALSBURY, C.
COLERIDGE, C. J.
ESHER, M. R.
JAMES HANNEN, Prest. P. D. A.
NATH. LINDLEY, L. J.
EDW. FRY, L. J.
C. E. POLLOCK, B.
H. MANISTY, J.

December 18th, 1885.

* For scale of fees, see *post*, p. 523.

ADDITIONAL RULE, 1904.

(Which came into force October 24th, 1904.)

Previous Proceedings.

219. In all proceedings before the Court for divorce and matrimonial causes, the petition shall state whether or no there have been any—and if so what—proceedings previous thereto with reference to the marriage in the Divorce Division of the High Court by or on behalf of either of the parties to the marriage.

ADDITIONAL RULE, 1905.

(Coming into force October 24th, 1905.)

220. In all proceedings before the Court for divorce and matrimonial causes, the petition shall state the description of the husband and the place of residence, and the domicile of the parties to the marriage at the time of the institution of the suit.

FEES

To be taken for their own use by Solicitors of the Supreme Court of Judicature in respect to Divorce and Matrimonial Causes on and after the 1st day of January, 1886.

	Old Scale.	Higher Scale.	Lower Scale.
	£ s. d.	£ s. d.	£ s. d.
<i>Citations, Subpœnas, Writs, Summonses, Notices, and Service of same.</i>			
Citation, including præcipe	0 7 6	—	—
Citation to see proceedings, including præcipe .	0 7 6	—	—
Certificate of service	0 2 6	—	—
Subpœna <i>ad testificandum</i> and præcipe	—	0 6 8	0 6 8
Subpœna <i>duces tecum</i> , if four folios of seventy-two words or under, and præcipe	—	0 6 8	0 6 8
If the subpœna exceeds four folios in length, for each additional folio of seventy-two words	—	0 1 4	0 1 4
Writ of attachment, including præcipe	—	0 10 0	0 7 0
Writ of sequestration, including præcipe	—	0 10 0	0 7 0
Summons, including copy for the Court	—	0 8 8	0 5 0
Summons, each copy of, for service	—	0 2 0	0 1 0
Or per folio	—	0 0 4	0 0 4
For preparing notice to produce on the trial, or notice to admit	—	0 7 6	0 5 0
If necessarily long, not exceeding per folio	—	0 1 0	0 0 8
For preparing notice of motion	—	0 5 0	0 3 0
Or per folio	—	0 1 0	0 1 0
For preparing any other notice	—	0 1 6	0 1 6
If necessarily exceeding three folios, for each folio beyond three	—	0 1 0	0 1 0
For each copy for service	—	0 1 0	0 1 0
Or per folio	—	0 0 4	0 0 4
Personal service of citation, petition, or subpœna, or other document, if within two miles of the place of business of the practitioner, or of the person employed to effect the service	0 5 0	0 5 0	0 5 0
If beyond that distance, for each mile beyond such two miles	0 1 0	0 1 0	0 1 0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition	—	0 7 0	0 7 0
In cases in which the person to be served shall avoid service, or shall reside beyond the jurisdiction, a sum to be allowed for service according to the circumstances.			
Service, where an appearance has been entered, on the solicitor or party	—	0 2 6	0 2 6

	Old Scale.	Higher Scale.	Lower Scale.
	£ s. d.	£ s. d.	£ s. d.
<i>Instructions.</i>			
Instructions for citations, petitions, answers, or other pleadings, or amendment of pleadings, for interrogatories, special affidavits, or applications for an order for protection of a wife's earnings and property	0 6 8	0 13 4	0 6 8
Ditto to defend suit	—	0 13 4	0 6 8
Ditto for brief, on hearing	—	2 2 0	1 1 0
If there are several witnesses examined, and the brief or case is necessarily long, an additional fee will be allowed.			
Ditto for counsel to make any application to the Court where no other brief	—	0 10 0	0 6 8
<i>Pleadings and Perusal.</i>			
Drawing and engrossing all petitions and answers, if ten folios of seventy-two words or under, including a copy to file	1 0 0	—	—
If exceeding ten folios, for every additional folio, including a copy to file	0 1 4	—	—
Drawing and engrossing replications and other subsequent pleadings	—	0 10 0	0 5 0
Or per folio	—	0 1 0	0 1 0
For case for motion, including fair copy for the Court	0 10 0	—	—
If necessarily more than seven folios for every additional folio including copy for the Court	0 1 4	—	—
Drawing and engrossing demurrer, inclusive of the statement of any matter of law to be argued, for ten folios of seventy-two words or under	0 10 0	—	—
If exceeding ten folios of seventy-two words, for every additional folio of seventy-two words	0 1 0	—	—
Drawing bill of costs, per folio of seventy-two words, including copy for taxation	—	0 0 8	0 0 8
Drawing any instrument to be filed in or issued by the registry for which no other fee is herein allowed, inclusive of fair copy to be filed or issued, per folio of seventy-two words	0 1 4	—	—
For perusing and abstracting pleadings, affidavits, exhibits, and other documents	—	0 13 4	0 6 8
Or per folio	—	0 0 4	0 0 4
<i>Copies.</i>			
Copies of petitions, answers, and other pleadings, also of exhibits, bills of costs, or other documents, where no other provision is made, at per folio of seventy-two words	—	0 0 4	0 0 4
If any exhibit or other document to be copied, or any part thereof contains pencil marks or writing, or the copy thereof, or any part thereof, is required to be made fac-simile, in addition to any other fee for the copy:			
For every folio of pencil marks or writing, or copy fac-simile, or part of a folio	0 0 4	—	—

	Old Scale.	Higher Scale.	Lower Scale.
	£ s. d.	£ s. d.	£ s. d.
<i>Attendances.</i>			
On entering appearance	0 6 8	—	—
To search for appearance to citation	0 6 8	—	—
On counsel with brief, when the fee to counsel is one guinea	—	0 6 8	0 3 4
When the fee to counsel exceeds one guinea and is under five guineas	—	0 6 8	0 6 8
When the fee is five guineas or more, but under twenty guineas	—	0 13 4	0 6 8
When the fee is twenty guineas	—	1 1 0	0 13 4
When the fee is forty guineas or more	—	2 2 0	—
On consultation or conference	—	0 13 4	0 13 4
In pursuance of notice to admit	—	0 13 4	0 6 8
Or per hour	—	0 6 8	0 6 8
On trial or hearing when cause is in paper and not tried or heard, or on motion in Court	—	0 10 0	0 10 0
On trial or hearing	—	1 1 0	0 13 4
Or according to circumstances, not to exceed	—	3 3 0	3 3 0
On taxation of bill of costs	—	0 6 8	0 6 8
Or according to circumstances, not to exceed Unless very long, when an additional fee will be allowed.	—	2 2 0	2 2 0
On examination of witnesses before any examiner, commissioner, officer, or other person	—	0 13 4	0 13 4
Or according to circumstances, not to exceed	—	2 2 0	2 2 0
Or if without counsel, not to exceed	—	3 3 0	3 0 0
For all necessary attendances in chambers, in the registry, before a commissioner, or counsel, or upon the adverse parties or solicitor, for which no other fee is herein allowed	0 6 8	—	—
<i>Briefs, Cases for Hearing, Term Fees, &c.</i>			
For drawing brief or case for hearing, per folio of seventy-two words	—	0 1 0	0 1 0
For each copy, per folio of seventy-two words	—	0 0 4	0 0 4
For any special letter during the dependance of the cause	0 3 6	—	—
For every term commencing on the day the sittings commence and terminating on the day preceding the next sittings in which any business is done	—	0 15 0	0 15 0
And further in country agency causes or matters, for letters	—	0 6 0	0 6 0
Where no proceeding in the cause is taken which carries a term fee a charge for letters may be allowed if the circumstances require it.			
In addition to the above an allowance is to be made for the necessary expense of postage, carriage, and transmission of documents.			
For maps or plans	1 1 0	—	—
to	3 3 0	—	—
0 10 0	—	—	—
Copies of same, if required	1 0 0	—	—
to			

APPENDIX.

	Old Scale.	Higher Scale.	Lower Scale.
	£ s. d.	£ s. d.	£ s. d.
<i>Affidavits.</i>			
Drawing and engrossing affidavit of service or search, if three folios of seventy-two words or under	0 5 0	—	—
If above, for every additional folio, including a copy for the Court	0 1 4	—	—
For drawing and engrossing any other affidavit, including copy for the Court or registry, per folio	—	0 1 4	0 1 4
For preparing each exhibit in town or country	—	0 1 0	0 1 0
<i>Interrogatories.</i>			
For drawing the same, at per folio of seventy-two words	0 1 0	0 1 0	0 1 0
Copy thereof to be delivered to the examiner and filed, at per folio of seventy-two words..	0 0 4	0 0 4	0 0 4
If it becomes necessary for solicitors to transact any business for which no fee is herein specified, such fee shall be taken by them as would be allowed for similar business done in the other divisions of the High Court of Justice.			

FEES

*To be taken for the use of other Persons by Solicitors of the
Supreme Court of Judicature in respect to Divorce
and Matrimonial Causes on and after the 1st day of
January, 1886.*

Counsels' Clerks' Fees.

Not to exceed as under :	£	s.	d.
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards—at per cent. on the fee paid	2	10	0
On consultations :			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On general retainer (where allowed)	0	10	6
On common retainer	0	2	6
On conference	0	5	0

Allowance to Witnesses, including their board and lodging.

Common witnesses, such as labourers, journeymen, &c., &c. :

If resident within five miles of the General Post Office, per diem	0	5	0
If resident beyond that distance, per diem, from	0	5	0
	to	0	7
	6		

Master tradesmen, yeomen, farmers, &c. :

If resident within five miles of the General Post Office, per diem, from	0	7	6
	to	0	10
	0	10	0
If resident beyond that distance, per diem, from	0	10	0
	to	15	0

Auctioneers and accountants :

If resident within five miles of the General Post Office, per diem, from	0	10	6
	to	1	1
	0	10	6
If resident beyond that distance, per diem, from	0	10	6
	to	1	1
	0	1	0

Allowance to Witnesses—continued.

	£	s.	d.
Professional men :			
If resident within five miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem, from	2	2	0
	3	3	0
Clerks to attornies, or others :			
If resident within five miles of the General Post Office, per diem	0	10	6
If resident beyond that distance, per diem, from	0	15	0
	1	1	0
Engineers and surveyors :			
If resident within five miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem, from	1	1	0
	3	3	0
Notaries, per diem	1	1	0
Esquires, bankers, merchants, and gentlemen, per diem	1	1	0
Females, according to station in life :			
If resident within five miles of the General Post Office, per diem, from	0	5	0
	0	10	0
If resident beyond that distance, per diem, from	0	5	0
	1	0	0
Police inspector :			
If resident within five miles of the General Post Office, per diem	0	5	0
If resident beyond that distance, per diem, from	0	7	6
	0	10	0
Police constable :			
If resident within five miles of the General Post Office, per diem	0	3	0
If resident beyond that distance, per diem, from	0	5	0
	0	7	6
The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid ; but in no case will there be an allowance for such expenses of more than 1s. per mile one way.			
Commissioners for taking oaths :			
For administering oaths to each deponent	0	1	6
For marking each exhibit annexed to an affidavit	0	1	0

PROVISIONAL ORDER (MARRIAGES) ACT, 1905.

5 Edw. 7, c. 23.

An Act to enable Provisional Orders to be made for removing any Invalidity or Doubt attaching to Marriages by reason of some Informality. [11th August, 1905.]

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1.—(1) A Secretary of State may, in the case of marriages solemnised in England which appear to him to be invalid or of doubtful validity by reason of some informality, make a provisional order for the purpose of removing the invalidity or doubt.

Provisional orders for removing doubts as to validity of marriages.

(2) The draft of every such order shall be advertised in such manner as the Secretary of State thinks fit not less than one month before the order is made, and the Secretary of State shall consider all objections to the order sent to him in writing during that month, and shall, if it appears to him necessary, direct a local inquiry into the validity of any such objections.

(3) An order of the Secretary of State under this Act shall be of no force unless confirmed by Parliament, and the Secretary of State may bring in a Bill for confirming the order; and if while a Bill confirming any such order is pending in either House of Parliament a petition is presented against the order, the Bill, so far as it relates to the order, may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of Private Bills.

2. This Act may be cited as the Provisional Order (Marriages) Short title. Act, 1905.

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